TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 307

C. A. HUDSON AND R. R. BROGAN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED MARCH 2, 1926

CERTIORARI GRANTED APRIL 19, 1926

(31,739)

(31,739)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 17, 1926

[fol. 1] [Captions omitted]

IN UNITED STATES DISTRICT COURT

THE UNITED STATES

vs.

THE McKEESPORT GAS COMPANY, C. A. HUDSON, R. R. BROGAN, and J. E. Crossland (Whose True First Names are Unknown)

Attorneys: Walter Lyon, F. C. McCutcheon, for United States; Frank P. Patterson, B. B. McGinnis, for defendants.

[fol. 2] DOCKET ENTRIES

Counts 1-6: Using the United States mails in a scheme to defraud.

Nov. 12, 1920.—A true bill.

Nov. 12, 1920.—Indictment filed.

Nov. 12, 1920.—Recognizance of defendant J. E. Crossland for Nov. T. 1920, taken and filed.

Nov. 17, 1920.—Recognizance of R. R. Brogan for May T. 1921, taken and filed.

Nov. 29, 1920.—Recognizance of C. A. Hudson for May T. 1921, taken and filed.

Mar. 4, 1921.—Order filed and entered fixing bail of C. A. Hudson and R. R. Brogan at $3,000 each.

Mar. 23, 1921.—Recognizance of R. R. Brogan taken and filed.

May 10, 1921.—Motion and Order for Nolle Prosequi as to McKeesport Gas Company, a corporation, filed and entered.

May 10, 1921.—Nolle Prosequi as to McKeesport Gas Company, a corporation, filed and entered. J. Wood Clark, Clerk.

May 27, 1921.—Motion and Order for Nollo Prosequi as to J. E. Crossland filed and entered.

May 27, 1921.—Nollo Prosequi as to J. E. Crossland hereby entered. J. Wood Clark, Clerk.

Jan. 19, 1925.—Petition and order for subpœna duces tecum filed and entered.

Jan. 19, 1925.—Subpœna duces tecum and copy issued.

[fol. 3] Feb. 3, 1925.—Defendants C. A. Hudson and R. R. Brogan plead Nolo Contendere.

Feb. 14, 1925.—Sentence of the Court is that you C. A. Hudson be imprisoned in the Federal Penitentiary at Atlanta, Georgia, for the term of one year and one day.

Feb. 14, 1925.—Sentence of the Court is that you R. R. Brogan be imprisoned in the Federal Penitentiary at Atlanta, Georgia, for the term of one year and one day.

Feb. 14, 1925.—Temporary Commitment (2) and (2) copies issued.

Feb. 14, 1925.—Final Commitment (2) and (2) copies issued.

Feb. 17, 1925.—Temporary Commitments (2) returned and filed.

Feb. 19, 1925.—Order endorsed on original sentence of C. A. Hudson as follows:—Attorney for defendant excepts to the foregoing sentence and at his request bill is hereby sealed and exception noted. Robert M. Gibson, District Judge.

Feb. 19, 1925.—Order endorsed on original sentence of R. R. Brogan as follows:—Attorney for defendant excepts to the foregoing sentence and at his request bill is hereby sealed and exception noted. Robert M. Gibson, District Judge.

Feb. 19, 1925.—Petition of C. A. Hudson for Writ of Error, jurat, order allowing Writ of Error and fixing supersedeas bond in the sum of $10,000 filed and entered.

[fol. 4] Feb. 19, 1925.—Assignment of Error filed.

Feb. 19, 1925.—Petition of R. R. Brogan for Writ of Error, jurat, order allowing Writ of Error and fixing supersedeas bond in the sum of $10,000 filed and entered.

Feb. 19, 1925.—Assignment of Error filed.

Feb. 24, 1925.—Citations (2) awarded and issued.

Feb. 24, 1925.—(2) Writs of Error issued and copy lodged in the Clerk's office.

Feb. 25, 1925.—Service of Citations (2) accepted by Walter Lyon, U. S. attorney.

Mar. 3, 1925.—Order on Petition of C. A. Hudson for Writ of Error reducing amount of bond to $5,000.00 entered.

Mar. 3, 1925.—Order on Petition of R. R. Brogan for Writ of Error reducing amount of bond to $5,000.00 entered.

Mar. 3, 1925.—Bond of C. A. Hudson for appearance pursuant to Mandate of Circuit Court of Appeals taken and filed.

Mar. 3, 1925.—Bond of R. R. Brogan for appearance pursuant to Mandate of Circuit Court of Appeals taken and filed.

Mar. 9, 1925.—Final Commitments (2) returned and filed. (Not executed.)

Mar. 19, 1925.— Præcipe re contents of record sur Writs of Error, filed.

Mar. 25th, 1925.—Bill of Exceptions signed, sealed and filed.

[fol. 5] IN UNITED STATES DISTRICT COURT

INDICTMENT—Filed November 12, 1920

Sections 215 and 37 of the Criminal Code

WESTERN DISTRICT OF PENNSYLVANIA, ss:

The Grand Jurors of the United States of America duly empaneled and sworn in the District Court of the United States for that district, upon their oaths, present:

That at all times the fifth day of December, 1919, to the time of the filing of this indictment, The McKeesport Gas Company was a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an office in the City of McKeesport, County of Allegheny and State of Pennsylvania, and that the authorized capital stock of the said corporation was one million dollars divided into one million shares, each of the par value of $1.00;

That on, to wit, the dates specified in the last paragraphs of the counts of this indictment, at the Western District of Pennsylvania, and within the jurisdiction of this Court, the said McKeesport Gas Company, C. A. Hudson, (whose true first name is to the Grand Jurors unknown), R. R. Brogan, (whose true first name is to the Grand Jurors unknown) and J. E. Crossland, (whose true first name is to the Grand Jurors unknown), named as defendants herein

[fol. 6] and hereafter referred to as the defendants, had theretofore, devised a scheme and artifice to defraud F. M. Stringer, Mrs. Joseph Sinfelt, Joseph R. Partridge, Anna F. Hallam and John P. McCullough, and divers other persons whose names are to the Grand Jurors unknown (a class of persons residing within the United States and not susceptible by reason of their great number and lack of information on the part of the Grand Jurors of being named herein, but comprising any and all persons whom the defendants could induce to purchase stock of The McKeesport Gas Company, said persons being hereinafter referred to as the persons to be defrauded) of their money and property in and by inducing by fraudulent representations, pretenses and promises and by fraudulent artifices and devices said persons to be defrauded to part with their money and property in the purchase of shares of the capital stock of the said McKeesport Gas Company, said scheme and artifice being more particularly set forth as follows:

It was intended by said defendants as a part of said scheme and artifice that they, the said defendants, should sell and offer for sale to the said persons to be defrauded capital stock in The McKeesport Gas Company; that they, the said defendants should fix arbitrarily the prices at which the said stock should be sold and offered for sale to the persons to be defrauded, and that they, the said defendants, should offer said stock to the said persons to be defrauded at prices forming a gradual ascending scale beginning at the par value of said stock, it being the intent and purpose of the said defendants in so doing to lead the per- [fol. 7] sons to be defrauded into believing that the company was in a strong financial condition and growing stronger in degree indicated by the increased prices at which said stock should be sold and offered for sale;

And it was intended by the said defendants as a further part of said scheme and artifice that certain large and unearned blocks of stock should be allotted to the said defendants, C. A. Hudson and R. R. Brogan, and that such stock should be issued on order signed by the said defendants, C. A. Hudson and R. R. Brogan, it being the intent and purpose of said defendants to sell such stock to the said persons to be defrauded by deceiving them into believing that

they would be purchasing treasury stock and that the proceeds of such sales would be applied to the development and expansion of the properties of the said McKeesport Gas Company;

And it was intended by said defendants as a further part of said scheme and artifice to sell, offer for sale and cause to be sold and offered for sale to the said persons to be defrauded shares of the capital stock of the said McKeesport Gas Company, and for the purpose of inducing the said persons to be defrauded to part with their money and property in the purchase of said stock so intended to be sold and offered for sale, the said defendants in substance intended falsely and fraudulently to represent, pretend and promise to said persons to be defrauded and to each of them, that The McKeesport Gas Company's holdings comprised about five hundred (500) acres and were in a proven field; that the officers and directors of The McKeesport Gas Company were men of integrity and very favorably known as upright [fol. 8] men of affairs; that The McKeesport Company guaranteed to drill twenty-one (21) wells in the McKeesport field and seventeen (17) of them would be drilled on large holdings which had gas production for 25 or 30 years; that the officers of the McKeesport Gas Company figure on future extensive developments not only on their large acreage in the McKeesport field, but in other gas and oil districts; that the progress made on April 1, 1920, indicated that in fifteen days The McKeesport Gas Company should have a large production of gas which mean dividends; that from April 1, 1920, to April 10, 1920, any one could buy from the company direct, at the rate of $1.50 per share, one-half as many shares as he then owned;

And each of the aforesaid representations, as the defendants and each of them then and there knew, were and would be false and fraudulent, and the said defendants intended thereby to deceive and defraud said persons to be defrauded and to induce said persons to be defrauded to part with their money and property in the purchase of said stock as aforesaid;

And it was a further part of said scheme and artifice that the said defendants should each appropriate and convert to his and its own use, in the form or guise of salary, draw-

ing account, expenses, commissions and profits arising from the sale of promotion stock, part of the money and property which would be paid by the said persons to be defrauded in the purchase of said stock of the said McKeesport Gas Company, as aforesaid; but the exact form in which each of the said defendants intended thus to convert and appropriate to his and its own use such part of said money and property [fol. 9] and the exact amount thereof that each of said defendants intended thus to appropriate and convert are to the Grand Jurors unknown;

And the said defendants so having devised and intended to devise the aforesaid scheme and artifice, did on the 5th day of April, 1920, at the Western District of Pennsylvania and within the jurisdiction of this Court, for the purpose of executing said scheme and artifice and attempting so to do, unlawfully, knowingly and feloniously place and cause to be placed in a Post Office of the United States, to wit, the Post Office in the City of McKeesport, County of Allegheny, in the Western District of Pennsylvania, to be sent and delivered by the Post Office Establishment of the United States to the addresses thereof, a certain letter enclosed in a post-paid envelope addressed to M. F. [illegible] Stringer, Jefferson County, Adena, Ohio, a copy of which said letter being as follows, to wit:

J. V. Harsha, President. L. F. Savage, V. Pres. and Gen'l Mgr. J. E. Crossland, Secty. and Treas.

McKeesport Gas Company, Moose Temple Building, 120 Fifth Avenue, McKeesport, Pa.

April 1st, 1920.

"Personal"

Stockholders of the McKeesport Gas Co.:

It gives us great pleasure to report in this, our first letter to you that your Company is now on the eve of production, [fol. 10] and that probably by the time this letter reaches you the first well will be in. After one of the severest winters experienced in many years, we are glad to be able to report to you the progress made by the Company to date.

Well No. 1, down 500 feet, work stopped awaiting to see what the well beside it gets at the Bradford Sand, they getting no gas in the Speechley. If they do not get gas we will abandon number one and spend the money on some other location.

Well No. 2, about fifty feet from the Hodges well which is reported doing ten million feet, is down 2,800 feet, and should be in the Speechley Sand by the time this letter reaches you. Those who claim to know say our location is the best of the two.

Well No. 3, down 1,400 feet and is being piped to take the gas in the Murrysville Sand which will be reached at about 1,555 feet, our neighbor there getting about two million feet in this sand.

Well No. 4, down 1,400 feet slightly delayed by a bent stem. This location looks extra good as the Fisher well is reported getting twenty-two million, the Grandview Drilling Company well fourteen million, and the Weill well sixteen million, all of which are close to our number four well.

Well No. 5, on the Keddy Acreage the rig is up, 8 and 10 inch casing on the ground, drilling to start soon.

Well No. 6, on the McClure lease rig up 8 and 10 inch casing on the ground, drilling operations will soon begin.

This progress means that inside of the next fifteen days your Company should have a large production of gas which [fol. 11] as you know means dividends to you. Now there is a portion of unsold stock left, and we are going to give you, being a stockholder of record, the chance to increase your holdings before offering it to the public at large, who are only awaiting for the gas to come in when they will rush in and buy.

In other words, you are going to profit by taking advantage of this opportunity.

From April first and including April tenth, you can buy from us direct for cash, money order or check by using the enclosed blank, one-half as many shares as you now own at $1.50 per share. This offer is extended only to bona fide stockholders of record as of this date. This opportunity ends midnight, April tenth and no orders will be accepted unless they are in the mails by that time.

We feel that this Company has a brilliant future, and if you want to come along with us, fill out the enclosed blank and mail it today.

Yours very truly, McKeesport Gas Company, by J. E. Crossland.

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 215, U. S. C. C.)

Second Count

And the Grand Jurors aforesaid on their oaths aforesaid do hereby reaffirm, reallege and reincorporate as if herein set forth in full all the allegations of the first count of this indictment, except those allegations contained in the [fol. 12] last paragraph thereof;

And the Grand Jurors aforesaid do further present that on the 2nd day of April, 1920, at the Western District of Pennsylvania and within the jurisdiction of this Court, the defendants so having devised and intending to devise the aforesaid scheme and artifice and for the purpose of executing the said scheme and artifice and attempting so to do, did unlawfully, knowingly and feloniously place and cause to be placed in a Post Office of the United States, to wit, the Post Office at McKeesport, County of Allegheny and State of Pennsylvania, in the Western District of Pennsylvania, to be sent and delivered by the Post Office Establishment of the United States to the addressee thereof, a certain letter enclosed in a post-paid envelope addressed to Mrs. Joseph Sinfelt, Munson, Pa., a copy of which said letter being as follows, to wit:

J. V. Harsha, President. L. F. Savage, V. Pres. and Gen'l Mgr. J. E. Crossland, Secty. and Treas.

McKeesport Gas Company, Moose Temple Building, 120 Fifth Avenue, McKeesport, Pa.

April 1st, 1920.

"Personal"

Stockholders of the McKeesport Gas Co.:

It gives us great pleasure to report in this, our first letter to you that your Company is now on the eve of production, and that probably by the time this letter reaches you the first well will be in. After one of the severest winters ex- [fol. 13] perienced in many years, we are glad to be able to report to you the progress made by the Company to date.

Well No. 1, down 500 feet, work stopped awaiting to see what the well beside it gets at the Bradford Sand, they getting no gas in the Speechley. If they do not get gas we will abandon number one and spend the money on some other location.

Well No. 2, about fifty feet from the Hodges well which is reported doing ten million feet, is down 2,800 feet, and should be in the Speechley Sand by the time this letter reaches you. Those who claim to know say our location is the best of the two.

Well No. 3, down 1,400 feet and is being piped to take the gas in the Murrysville Sand which will be reached at about 1,555 feet, our neighbor there getting about two million feet in this sand.

Well No. 4, down 1,400 feet slightly delayed by a bent stem. This location looks extra good as the Fisher well is reported getting twenty-two million, the Grandview Drilling Company well fourteen million, and the Weill well sixteen million, all of which are close to our number four well.

Well No. 5, on the Keddy Acreage the rig is up, 8 & 10 inch casing on the ground, drilling to start soon.

Well No. 6, on the McClure lease rig up, 8 & 10 inch casing on the ground, drilling operations will soon begin.

This progress means that inside of the next fifteen days your Company should have a large production of gas which

as you know means dividends to you. Now there is a portion of unsold stock left, and we are going to give you, be-
[fol. 14] ing a stockholder of record, the chance to increase your holdings before offering it to the public at large, who are only awaiting for the gas to come in when they will rush in and buy. In other words, you are going to profit by taking advantage of this opportunity.

From April first and including April tenth, you can buy from us direct for cash, money order or check by using the enclosed blank, one-half as many shares as you now own at $1.50 per share. This offer is extended only to bona fide stockholders of record as of this date. This opportunity ends midnight, April tenth and no orders will be accepted unless they are in the mails by that time.

We feel that this Company has a brilliant future, and if you want to come along with us, fill out the enclosed blank and mail it today.

Yours very truly, McKeesport Gas Company, by J. E. Crossland.

Special—Only good for 10 days from date only—Special.

April 1st, 1920.

McKeesport Gas Company, 120 Fifth Ave., McKeesport, Pa.:

Enclosed find remittance for — dollars payment in full for — shares McKeesport Gas Co. stock at $1.50 per share.

[fol. 15] Special to stockholders only.
Name: —— ——.
Town: ——. State: ——.
All cash—no time.
Not good after April 10th, 1920.

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Secs. 215, U. S. C. C.)

Third Count

And the Grand Jurors aforesaid, on their oaths aforesaid do hereby reaffirm, reallege and reincorporate as if herein

set forth in full all the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof:

And the Grand Jurors aforesaid do further present that on the 3rd day of April, 1920, at the Western District of Pennsylvania and within the jurisdiction of this Court, the defendants so having devised and intending to devise the aforesaid scheme and artifice and for the purpose of executing the said scheme and artifice and attempting so to do, did unlawfully, knowingly and feloniously place and cause to be placed in a Post Office of the United States, to wit, the Post Office at McKeesport, County of Allegheny and State of Pennsylvania, in the Western District of Pennsylvania, to be sent and delivered by the Post Office Establishment of [fol. 16] the United States to the addressee thereof, a certain letter enclosed in a postpaid envelope addressed to "Mr. Joseph R. Partridge, Box 291, Houtsdale, Pa.," a copy of which said letter being as follows, to wit:

J. V. Harsha, President. L. F. Savage, V. Pres. and Gen'l Mgr. J. E. Crossland, Secty. and Treas.

McKeesport Gas Company, Moose Temple Building, 120 Fifth Avenue, McKeesport, Pa.

April 1st, 1920.

"Personal"

Stockholders of the McKeesport Gas Co.:

It gives us great pleasure to report in this, our first letter to you that your Company is now on the eve of production, and that probably by the time this letter reaches you the first well will be in. After one of the severest winters experienced in many years, we are glad to be able to report to you the progress made by the — Company to date.

Well No. 1, down 500 feet, work stopped awaiting to see what the well beside it gets at the Branford Sand, they getting no gas in the Speechley. If they do not get gas we will abandon number one and spend the money on some other location.

Well No. 2, about fifty feet from the Hodges well which

is reported doing ten million feet, is down 2800 feet, and should be in the Speechley Sand by the time this letter reaches you. Those who claim to know say our location is the best of the two.

[fol. 17] Well No. 3, down 1400 feet and is being piped to take the gas in the Murrysville Sand which will be reached at about 1555 feet, our neighbor there getting about two million feet in this sand.

Well No. 4, down 1400 feet slightly delayed by a bent stem. This location looks extra good as the Fisher well is reported getting twenty-two million, the Grandview Drilling Company well fourteen million, and the Weill well sixteen million, all of which are close to our number four well.

Well No. 5, on the Keddy Acreage the rig is up, 8 & 10 inch casing on the ground, drilling to start soon.

Well No. 6, on the McClure lease rig up, 8 & 10 inch casing on the ground, drilling operations will soon begin.

This progress means that inside of the next fifteen days your Company should have a large production of gas which as you know means dividends to you. Now there is a portion of unsold stock left, and we are going to give you, being a stockholder of record, the chance to increase your holdings before offering it to the public at large, who are only awaiting the gas to come in when they will rush in and buy. In other words, you are going to profit by taking advantage of this opportunity.

From April first and including April tenth, you can buy from us direct for cash, money order or check by using the enclosed blank, one-half as many shares as you now own at $1.50 per share. This offer is extended only to bonafide stockholders of record as of this date. This opportunity [fol. 18] ends midnight, April tenth and no orders will be accepted unless they are in the mails by that time.

We feel that this Company has a brilliant future, and if you want to come along with us, fill out the enclosed blank and mail it today.

Yours very truly, McKeesport Gas Company, by J. E. Crossland.

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Sec. 215, U. S. C. C.).

FOURTH COUNT

And the Grand Jurors aforesaid upon their oaths aforesaid, do hereby reaffirm, reallege and reincorporate as if herein set forth in full all the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof:

And the Grand Jurors aforesaid, do further present that on the 7th day of April, 1920, at the Western District of Pennsylvania and within the jurisdiction of this Court, the defendants so having devised and intending to devise the aforesaid scheme and artifice and for the purpose of executing the said scheme and artifice and attempting so to do, did unlawfully, knowingly and feloniously place and cause to be placed in a Post Office of the United States, to wit, the Post Office at Pittsburgh, County of Allegheny and State of Pennsylvania, in the Western District of Pennsylvania, to be sent and delivered by the Post Office Establishment of [fol. 19] the United States to the addressee thereof, a certain letter enclosed in a postpaid envelope addressed to "Anna F. Hallam, 26 Coulter St., Crafton, Pa.," a copy of which said letter being as follows, to wit:

Hudson-Brogan & Co., Investments, 11th Floor 5th Ave. Arcade Bldg., 230-232 Fifth Avenue, Pittsburgh, Pa.

Main 757. Court 4934

April 6th, 1920.

Special Announcement to Our Friends

Your judgment was good when you selected McKeesport Gas Company stock as an investment.

The first proof came April fourth, Easter Sunday, when their well #2 came in reported doing eight million and have twelve or fifteen feet yet to go. The high wind Sunday night blew the top off of the rig which will be repaired and the well finished which should increase the flow quite materially, the gas is now in the line.

Well #3 came in Easter Sunday, reported doing two million in the Murrysville Sand, awaiting a line to take the gas.

Well No. 4, not far from the Grandview Drilling Company well which is reported doing between thirteen million and fourteen million, the Fisher No. 4 reported making twenty-two million and the Weill well reported making sixteen million feet, should be in this month. In our opinion this will make a splendid well.

[fol. 20] Well No. 1 standing awaiting developments on the adjoining lease.

Wells No. 5 and No. 6 on the McClure and Keddy acreage across the Yough River rigs up and casing on the ground drilling will start soon.

We are enclosing a buying order giving you an opportunity to increase your holdings in this stock at $2.00 per share, (subject to advance without notice) before the advance comes which is more than justified by the success up to date. Our advice is to buy all of this stock you can carry.

Yours very truly, Hudson-Brogan & Co., by C. A. Hudson.

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 215 U. S. C. C.)

Fifth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege and reincorporate as if herein set forth in full all the allegations of the first count of this indictment, except those allegations contained in the last paragraph hereof.

And the Grand Jurors aforesaid, do further present that on the 6th day of April, 1920, at the Western District of Pennsylvania and within the jurisdiction of this Court, the defendants so having devised and intending to devise the aforesaid scheme and artifice and for the purpose of executing the said scheme and artifice and attempting so to do, [fol. 21] did unlawfully, knowingly and feloniously place and cause to be placed in a Post Office of the United States, to wit, the Post Office at Pittsburgh, County of Allegheny and State of Pennsylvania, in the Western District of Pennsylvania, to be sent and delivered by the Post Office Establishment of the United States to the addressee thereof, a

certain letter enclosed in a post paid envelope addressed to "John P. McCullough, 1715 Suburban Ave., City," a copy of which said letter being as follows, to wit:

Hudson-Brogan & Co., Investments, 11th Floor 5th Ave. Arcade Bldg., 230-232 Fifth Avenue, Pittsburgh, Pa.

Main 757. Court 4934

April 6th, 1920.

Special Announcement to Our Friends

Your judgment was good when you selected McKeesport Gas Company stock as an investment.

The first proof came April fourth, Easter Sunday, when their well #2 came in reported doing eight million and have twelve or fifteen feet yet to go. The high wind Sunday night blew the top off the rig which will be repaired and the well finished which should increase the flow quite materially, the gas is now in the line.

Well No. 3 came in Easter Sunday, reported doing two million in the Murrysville Sand, awaiting a line to take the gas.

[fol. 22] Well No. 4, not far from the Grandview Drilling Company well which is reported doing between thirteen million and fourteen million, the Fisher No. 4 reported making twenty-two million and the Weill well reported making sixteen million feet, should be in this month. In our opinion this will make a splendid well.

Well No. 1 standing awaiting developments on the adjoining lease.

Wells No. 5 and No. 6 on the McClure and Keddy acreage across the Yough River rigs up and casing on the ground drilling will start soon.

We are enclosing a buying order giving you an opportunity to increase your holdings in this stock at $2.00 per share, (subject to advance without notice) before the advance comes which is more than justified by the success up to date. Our advice is to buy all of this stock you can carry.

Yours very truly, Hudson-Brogan & Co., by C. A. Hudson.

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec 215 U. S. C. C.)

Sixth Count

And the Grand Jurors aforesaid on their oaths aforesaid, do further present that the said defendants, The McKeesport Gas Company, C. A. Hudson, (whose true first name is to the Grand Jurors unknown) R. R. Brogan, (whose true first name is to the Grand Jurors unknown) and J. E. [fol. 23] Crossland (whose true first name is to the Grand Jurors unknown) continuously through the period of time from the 5th day of December, A. D. 1920, to the time of the filing of this indictment, in the County of Allegheny, State of Pennsylvania, Western District of Pennsylvania, and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together and with divers other persons to said Grand Jurors unknown, to commit divers offenses against the United States, to wit, the divers offenses charged against the said defendants in the divers counts of this indictment preceding this count and made offenses by Section 215 of the Criminal Code of the United States; and that said defendants did thereafter do divers acts to effect the object of said unlawful and felonious conspiracy, to wit, not only the several acts of placing letters, circular letters, advertisements and publications in the Post Office of the United States in the Cities of McKeesport and Pittsburgh, County of Allegheny, State of Pennsylvania aforesaid, described in said several preceding counts, but numerous acts of preparing said letters, circular letters, advertisements and publications for mailing, of making the false and fraudulent pretenses, representations and promises in the first count of this indictment described, and obtaining by means thereof the moneys of persons belonging to the class of persons in said count mentioned, as well as certain other overt acts, now here specified; that is to say:

[fol. 24] Overt Acts

In furtherance of said conspiracy and to effect the object thereof, the defendants, The McKeesport Gas Company, C. A. Hudson, R. R. Brogan and J. E. Crossland, in the City of Pittsburgh, County of Allegheny, State of Pennsylvania, in the Western District of Pennsylvania, did maintain an office at 230-232 Fifth Avenue, said office being maintained between December 5, 1919, and June 1, 1920;

And further to effect the object of the said conspiracy and pursuant thereto, the defendants, The McKeesport Gas Company, C. A. Hudson, R. R. Brogan and J. E. Crossland, in the City of McKeesport, County of Allegheny, State of Pennsylvania, and within the jurisdiction of this Court, did maintain an office in the Moose Temple Building, 120 Fifth Avenue, said office being maintained between December 5, 1919, and April 1, 1920;

And further to effect the object of said conspiracy and pursuant thereto, the defendants, The McKeesport Gas Company, C. A. Hudson, R. R. Brogan and J. E. Crossland, in the City of Pittsburgh, County of Allegheny, State of Pennsylvania, and within the jurisdiction of this Court, did on the 14th day of January, 1920, execute an order for the issuance of stock in the McKeesport Gas Company as follows:

Hudson-Brogan & Co., Investments, Room 129 Union Arcade, Pittsburgh, Pa.

January Fourteenth, 1920.

[fol. 25] Mr. K. E. Crossland, Secy. & Treas., McKeesport Gas Company, McKeesport, Pa.

Dear Sir: Please issue 17,156 shares to the following parties, named in the amounts mentioned hereto attached. In the ratio of 3 shares of Company stock and 2 shares of stock charging our cash account for 10,293 3/5 shares and issuing from our stock 6,822 2/5 shares.

Very truly yours, Hudson-Brogan Co., by R. R. Brogan.

EG.

P. S.—Enclosed find check for $25,000.—#1876 which credit to our account.

Hudson Brogan & Co., per Brogan.

And further to effect the object of said conspiracy and pursuant thereto, the defendants, The McKeesport Gas Company, C. A. Hudson, R. R. Brogan and J. E. Crossland, in the City of Pittsburgh, County of Allegheny, State of Pennsylvania, and within the jurisdiction of this Court, did on the 18th day of May, 1920, execute an order for the issuance of stock in The McKeesport Gas Company, as follows:

Hudson-Brogan & Co., Investments, 11th Floor 5th Ave. Arcade Bldg., 230-232 Fifth Ave., Pittsburgh, Pa.

May Eighteenth, 1920.

[fol. 26] Mr. J. E. Crossland, Moose Temple, McKeesport, Pa.

Dear Sir: Kindly issue the following certificates to the amount of 1394 shares in the names hereto attached, and charge to our stock account.

Yours very truly, Hudson-Brogan & Co., by R. R. Brogan.

B/EB.

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 37 U. S. C. C.)

D. J. Driscoll, United States Attorney.

Back or Cover of Indictment, with Plea and Judgment

Witnesses: √Elsa M. Smith, Gertrude Middleton, John Sinfelt, S. B. Anderson, √John P. McCullough, Anna Hallam, George A. Alsop, J. E. White, Emma Recomm, Harry Campbell, Ira L. Clear, Edward Brown, √O. B. Williamson.

The above witnesses whose names are checked sworn by me this 12th day of November, A. D. 1920.

Thos. E. Morgan, Foreman.

[fol. 27] In United States District Court

Bill of Exceptions

Caption

Be It Remembered that this case came on for trial on the 3rd day of February, A. D. 1925, before the Hon. Robert M. Gibson of the United States District Court at Pittsburgh, Pennsylvania, at which time the said C. A. Hudson and R. R. Brogan entered a plea of nolo contendere, in the course of which case the proceedings were as follows:

Plea

The defendants, C. A. Hudson and R. R. Brogan waive arrangement and plead nollo contendere in open Court, this 3rd day of February, 1925.

C. A. Hudson, R. R. Brogan.

Sentence—Filed February 14, 1925

And now to wit, February 14th, A. D. 1925, the sentence of the Court is, that you be imprisoned in the Federal Penitentiary at Atlanta, Georgia, for and during the term of one year and one day and be subject to the same discipline and treatment as convicts sentenced by the Courts of the State; and while so confined therein you shall be exclusively under the control of the officers having charge of the said [fol. 28] Federal Penitentiary; and stand committed until this sentence be complied with. Sentence to run from this date.

Per Curiam.

G.

Attorney for defendant excepts to the foregoing sentence and at his request bill is hereby sealed and exception noted.

Robert M. Gibson, District Judge. [Seal.]

[fol. 29] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The defendants, C. A. Hudson and R. R. Brogan, contending that sundry errors were committed in the proceedings of said case, tender the foregoing Bill of Exceptions to the actions and rulings of the said Court, and pray that the same may be settled and sealed and made a part of the record, and it is so accordingly done and ordered this 25th day of March, A. D. 1925.

Robert M. Gibson. [Seal.]

[fol. 30] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERROR OF DEFENDANT

R. R. BROGAN—Filed February 19, 1925

And now, to-wit: this 19th day of February, 1925, came the defendant, R. R. Brogan, by his counsel, Neil W. McGill, H. D. Montgomery and B. B. McGinnis, Esqs., and in connection with his petition for a Writ of Error herein, makes the following assignment of error, which he states occurred on the trial:—

The learned Court erred in imposing on the defendant, R. R. Brogan, a sentence of one year and one day to the Federal Penitentiary at Atlanta, Georgia, after having accepted a plea of nollo contendere.

Neil W. McGill, H. D. Montgomery, B. B. McGinnis,
Attorneys for Defendant, now Plaintiff in Error.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERROR OF DEFENDANT C. A. HUDSON—Filed February 19, 1925

And now, to wit, this 19th day of February, 1925, came to the defendant, C. A. Hudson, by his counsel, Neil W. McGill, H. D. Montgomery and B. B. McGinnis, Esqs., and in

connection with his petition for a Writ of Error herein, makes the following assignment of error, which he states occurred on the trial:

"The learned Court erred in imposing on the defendant, [fol. 31] C. A. Hudson, a sentence of one year and one day to the Federal Penitentiary at Atlanta, Georgia, after having accepted a plea of nollo contendere."

Neil W. McGill, H. D. Montgomery, B. B. McGinnis,
Attorneys for Defendant, now Plaintiff in Error.

IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD

J. Wood Clark, Esq., Clerk:

Please take notice that the printed record for the appeal in the above entitled case will consist of the following:

1. Docket Entries.
2. Indictment.
3. Pleas.
4. Sentences.
5. Assignments of Error.
6. Bill of Exceptions.
7. Praecipe re: Contents of Record Sur Writ of Error.

And the plaintiffs in error ask the Court to deliver to them the above papers for the purpose of causing the same to be printed.

B. B. McGinnis, Frank P. Patterson, Attorneys for
Plaintiffs in Error.

[fol. 32] And now, to wit, March 19th, 1925, service of the above notice accepted, and the five-day notice required by District Rule No. 39 is hereby waived.

Warren H. Vankirk, Attorney for the United States.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1925

No. 3335 (List No. 18)

C. A. Hudson et al., Plaintiffs in Error,

vs.

United States, Defendant in Error

In Error to the District Court of the United States for the Western District of Pennsylvania

Order Assigning Judge—Filed October 15, 1925

And now, to wit, this 15th day of October, A. D. 1925, it is ordered that Hon. William Clark, District Judge for the District of New Jersey, be, and he is hereby, assigned to sit in above case in order to make a full court.

Per Curiam.

Buffington, J., Circuit Judge.

[File endorsement omitted.]

[fol. 34] Minute entry of argument and submission October 15, 1925, omitted in printing.

[fol. 35] In United States Circuit Court of Appeals

[Title omitted]

In Error to the District Court of the United States for the Western District of Pennsylvania

Before Buffington and Woolley, Circuit Judges, and Clark, District Judge

Opinion—Filed December 3, 1925

Woolley, Circuit Judge:

The indictment against Hudson and Brogan contains six counts; the first five, drawn under Section 215 of the Criminal Code, charge use of the mails with intent to defraud; and the last, drawn under Section 37 of the Criminal Code, charges conspiracy to commit the offenses named in the previous counts. The penalties for offenses of both kinds are fine or imprisonment, or both. 35 Stat. 1130, 1096.

On being arraigned, Hudson and Brogan (whom we shall call the defendants) tendered pleas of nolo contendere. The court accepted them and imposed sentences of imprisonment. The defendants then sued out this writ of error and, challenging the action of the court, have raised the question: Has a federal district court, after accepting a plea of nolo contendere, power to impose a sentence of imprisonment? The answer turns on the nature of the plea [fol. 36] and the character of the penalty prescribed for the offense to which the plea is directed.

The plea of nolo contendere was long known at common law. It was there regarded not as a plea of right but as a plea of grace to be accepted or refused by the court in its discretion. This was because the plea was neither one of guilty nor one of not guilty but rather an appeal for mercy. Being in form a declaration by the accused that "he will not contend with the" prosecuting authority under the charge, it was not, in the strict sense of that term in the criminal law, a plea at all. It was, however, treated as a plea and its effect, when entered, was that of confession of guilt, and on a record thus made sentence could validly be

imposed; but the confession, implicit in the plea, could not be used against the defendant in any civil suit for the same act. This, briefly, was the common law understanding of the plea of nolo contendere, and, in the absence of federal statutes providing for its use or varying its meaning, this also is the nature of the plea in federal jurisprudence.

The next question—when upon such a plea may a court impose a sentence of imprisonment—is fraught with more difficulty, involving distinctions between the use of the plea in cases for major and minor offenses and between sentences where imprisonment is, under the statute, either mandatory or discretionary with the court.

The defendants, relying upon decisions at common law which hold the plea not applicable in capital cases and upon decisions which hold it applicable in cases where a defendant desires "to submit to a small fine," maintain that when the plea is accepted in a case where, as here, the statute provides a penalty by fine or imprisonment a federal court is without power to impose a penalty of imprisonment and is limited to the alternative penalty of a fine. The infirmity of this position is disclosed by the authorities cited and the reasoning of the opinion in Tucker vs. United States, 196 [fol. 37] Fed. (C. C. A. 8th) 860. In that case the court cited nearly all the cases on the subject that have come to our attention and, reviewing many of them, pursued a line of reasoning to which we subscribe and to which we refer for the ground of our decision.

Unquestionably at common law the plea could not be accepted in capital cases. Whether it was applicable in cases of felony where the punishment was by imprisonment alone is not clear. With equal certainty the plea was accepted in cases where the punishment was by a fine alone. There the English decisions seem to stop.

In America the trend of state decisions is toward the acceptance of the plea in cases where the punishment is by fine or imprisonment. This, while persuasive, is not controlling on federal courts. United States vs. Thompson, 251 U. S. 407. Nor does the decision in the Tucker case control the instant case on the facts, for there the plea was entered to the indictment wherein some counts charged offenses whose punishment was by imprisonment alone and

therefore mandatory upon the court and other counts charged offenses whose punishment was by fine or imprisonment and therefore discretionary with the court. Yet the reasoning in that case and in the companion case of Shapiro vs. United States, 196 Fed. 268; 235 U. S. 412, shows the rule, which is:

(a) The plea of nolo contendere is not applicable, and, if tendered, cannot be accepted in a case where, under a statute, the punishment must be by imprisonment, with or without a fine; (b) but it is applicable, and, if tendered, may be accepted in a case where the punishment may be by fine alone, although the offense may as well be punishable by imprisonment; and (c) when so tendered and accepted the sentence may, in the court's discretion, prescribe both fine and imprisonment, or imprisonment or fine alone, —in any event without limitation (except that of the statute) upon the size of the penalty.

[fol. 38] The sentence of the court validly came within the last classification and therefore its judgment is affirmed.

[File endorsement omitted.]

[fol. 39] In United States Circuit Court of Appeals

[Title omitted]

In Error to the District Court of the United States for the Western District of Pennsylvania

Judgment—Filed December 3, 1925

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

Philadelphia, December 3, 1925.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 40] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 41] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 19, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted]307

FILED
MAR 2 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM, 1926.

C. A. HUDSON, Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, And BRIEF IN SUPPORT THEREOF.

FRANK P. PATTERSON,
BERNARD B. McGINNIS,
Attorneys for Petitioner.

908 Park Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 210-212 GRANT ST., PITTSBURGH, PA.

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IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM, 1926.

C. A. HUDSON, Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit,

And

Brief in Support Thereof.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of the undersigned respectfully shows:

That the Petitioner, on the 3rd day of February, 1925, waived arraignment and pleaded *nolo contendere* in open court before Honorable Robert M. Gibson, Judge of the United States District Court for the Western District of Pennsylvania, at Pittsburgh, Pennsylvania, to an indictment containing six counts, the first five counts charging the defendants with

having violated Section 215 of the Criminal Code, i. e., using the mails to defraud, and the sixth count charging the defendants with violating Section 37 of the Criminal Code, i. e., conspiring to commit the offenses charged in the first five counts of the indictment. On February 14, 1925, the Petitioner, C. A. Hudson was sentenced to be imprisoned in the Federal Penitentiary at Atlanta, Georgia, for and during the period of one year and one day.

That this case was duly appealed to the Circuit Court of Appeals for the Third Circuit from the District Court of the United States for the Western District of Pennsylvania, and came on to be heard by the Circuit Court of Appeals at No. 3335 on the 15th day of October, 1925, and that on the 3rd day of December, 1925, the opinion of the Circuit Court of Appeals was delivered and filed, affirming the judgment of the District Court.

That the question involved before the Circuit Court of Appeals was: Has a Federal District Court, after accepting a plea of *nolo contendere,* power to impose a sentence of imprisonment in a Federal Penitentiary?

That the decision of the Circuit Court of Appeals, Third Circuit, in the present case, is in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, *Tucker vs. United States,* 196 Fed., 260, and also in conflict with instructions of the Attorney General of the United States issued July 1, 1925 to United States Attorneys, which instructions state that the plea of *nolo contendere* "should be accepted only in cases punishable solely by fine."

That unless the aforesaid conflict of decisions of two Circuit Courts of Appeals is clarified it will result in incalculable confusion and uncertainty in the Federal Courts.

That the decision of the said Circuit Court of Appeals, Third Circuit, is contrary to the common law as interpreted by the Federal Courts.

That the decision of the said Circuit Court of Appeals deprives your petitioner of his liberty without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled *"C. A. Hudson and R. R. Brogan, Plaintiffs-in-Error, vs. United States, Defendant-in-Error,* No. 3335 October Term, 1925," to the end that said case may be reviewed and determined by this Court, as provided in the Judicial Code, Section 240, or that your petitioner may have

such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed and remanded by this Honorable Court.

And your petitioner will every pray.

.....

Petitioner.

State of New York,
County of ..... } *ss*:

Personally appeared before me, a Notary Public in and for the County and State aforesaid, C. A. Hudson, who, being duly sworn according to law, deposes and says: He has read the foregoing petition; the same is true to his knowledge, information and belief; his knowledge is derived from the record and from what has taken place in his presence and hearing in the proceedings of this case.

.....

Sworn to and subscribed before me this ..... day of ....., A. D. 192.....

.....

Notary Public.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

Dated at Pittsburgh, Pennsylvania, this ..... day of ..... A. D. 192.....

.....

Counsel for Petitioner.

Brief in Support of Petition.

The District Court below erred in imposing on the defendant a sentence of one year and one day to the Federal Penitentiary at Atlanta, Georgia, after accepting a plea of *nolo contendere,* and the Circuit Court of Appeals for the Third Circuit should have reversed the judgment below for the reasons assigned in the said record in this case.

In the case of *Tucker vs. United States,* 196 Fed., 260, decided by the Circuit Court of Appeals, Eighth Circuit, January 2, 1912, the effect of a plea of *nolo contendere* was involved and decided contrary to the decision of the Circuit Court of Appeals, Third Circuit, in the present case.

The opinion of the Circuit Court of Appeals in the case at bar reads:

> (a) The plea of *nolo contendere* is not applicable, and, if tendered, cannot be accepted in a case where, under a statute, the punishment ***must*** be by imprisonment, with or without a fine;

(b) but it is applicable, and, if tendered, may be accepted in a case where the punishment *may* be by fine alone, although the offense may as well be punishable by imprisonment; and (c) when so tendered and accepted the sentence may, in the court's discretion, prescribe both fine and imprisonment, or imprisonment or fine alone—in any event without limitation (except that of the statute) upon the size of the penalty.

The effect of this is that a Federal Court may not impose a prison sentence upon a plea of *nolo contendere* if the statute demands imprisonment but may do so if the statute permits imprisonment. It is respectfully submitted that this is wholly irreconcilable with the opinion in *Tucker vs. United States*, 196 Fed., 260 U. S. Circuit Court of Appeals, Eighth Circuit, which declares,

> "The rule affords no ground for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed upon conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any term with or without fine."

The necessary effect of this is that the Court may not impose sentence of imprisonment upon the plea of *nolo contendere.*

It does not appear in the record in this case, but a perusal of the indictment in the Tucker case shows that the indictment charged violations of Sections 3296, 3326, 3324, 3455 and 3317 of the Revised Statutes. The punishment for violating Sec-

tion 3455 R. S. is "a fine of not less than $1,000.00 nor more than $5,000.00, or to imprisonment for not less than six months or more than five years, or to both, at the discretion of the Court." Concerning this, the Court in the Tucker case said:

> "So it was within the authority of the prosecuting officer to elect to stand, for the purpose of the plea, on the counts applicable thereto, and was plainly within the jurisdiction of the court to approve such plea. Were the subsequent proceedings consistent with acceptance of the plea in that view we are satisfied that no reversible error would appear in allowance thereof. * * * Moreover, the judgment is alike inconsistent with acceptance of the plea as above defined, in pronouncing imprisonment in the penitentiary for eighteen months."

The Tucker case, therefore, clearly decides that the plea was properly accepted in that case as applying to certain counts which contained charges punishable by fine or imprisonment or both, but that imprisonment in the penitentiary for eighteen months was "inconsistent with acceptance of the plea."

We beg to quote further from the Tucker case, 196 Fed., 260, as follows:

> "(2) The allowance of the 'implied confession' as a *nolo contendere* plea, thus defined to be the defendant's yielding to mercy in the punishment, 'and desiring to submit to a small fine,' necessarily implies, as we believe, that the case for such allowance must be within the class of misdemeanors for which punishment may be im-

posed by *fine alone,* although the offense may as well be punished by imprisonment, at the discretion of the court, either as an alternative of fine, or in addition thereto, or to enforce payment of the fine. That such desire (or request, express or implied) on the part of the accused 'to submit to a small fine' can neither serve to limit the fine to the minimum prescribed for the offense, nor constitute the measure of fine which may be imposed within the exercise of judicial discretion—that 'a small fine' is thus mentioned in the rule as a relative term, intending substantially less than the maximum—we have no doubt. This provision, however, for such purpose in the submission—as the object sought by the defendant in electing to submit without contest —requires construction of the rule accordingly, as limited to cases consistent with the purpose thus declared. So defined, the rule affords no ground for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any term, with or without a fine. Constrained to this interpretation of the narrow purpose and use of the plea at common law, by the express provisions of the rule thus handed down, we believe extension of the allowance to include even misdemeanors for which imprisonment must be imposed is unauthorized—however desirable it may seem—without statutory provision therefor. In arriving at such conclusion, we have not overlooked the settled doctrine that such

short terms of imprisonment were not 'infamous punishments' as defined in England and America for more than a century (see *Mackin vs. United States*, 117 U. S., 348, 351, 6 Sup. Ct., 777, 29 L. Ed., 909, and *Fitzpatrick vs. United States, ante*), nor the fact that imprisonment, at the time the rule was adopted, was frequently made the alternative of fines, or imposed together with a fine for 'crimes of inferior nature' (2 Cooley's Black, book 4, p. 5) 'in which the public punishment is not severe, but affords room for private compensation'—imposed also for commercial indebtedness —and was regarded with far less opprobrium than attaches to every form of imprisonment at the present day. Neither of these considerations appears to have entered into the framing of the rule, and we are not at liberty to adopt a different rule for application to the case at bar."

"(3) The contention, however, that the trial court was without jurisdiction to allow the plea under the indictment in the present case, we believe to be untenable, notwithstanding the foregoing interpretation of the rule. It is undoubted that the counts of the indictment, charging an offense for which at least three months' imprisonment must be imposed with a fine, are not within such interpretation, but other counts (as above mentioned) charged offenses which *may be punished by fine alone, and thus furnish ground for entertaining the nolo contendere plea,* as 'in the nature of a compromise' between the prosecutor and the defendant."

* * * * * * * *

That these proceedings and recitals leading up to the judgment are inconsistent with acceptance of the *nolo contendere* plea as tendered must be presumed, as we believe, under either of the contentions for interpretation of the rule. It may be that evidence may be heard under such plea for the purpose of determining *the amount of fine to be imposed*, but no issue is presented for trial under the indictment, and no adjudication of guilt is authorized. *Com. vs. Horton*, 9 Pick. (Mass) 206; *Com. vs. Ingersoll*, 145 Mass., 381, 382, 14 N. E., 449. The evidence referred to in the record is not preserved, but no presumption can be indulged, in the light of the various recitals, with no acceptance of the plea mentioned, that the evidence was received otherwise than for the purpose of the finding, upon which the judgment appears to be pronounced. Moreover, the judgment is alike inconsistent with acceptance of the plea, as above defined, in pronouncing imprisonment in the penitentiary for 18 months. The record, therefore, furnishes no ground to support the judgment as resting on acceptance of the plea (*Com. vs. Ingersoll, supra*), thus leaving it unsupported for want of either of the authorized pleas to the indictment.

The judgment of the District Court is reversed, accordingly, and the cause is remanded, with direction either to accept or refuse acceptance of such plea as tendered, and proceed thereupon in conformity with law. (Italics ours.)

On the same day, the same Court, basing its decisions on the reasons set forth in the Tucker case, reversed the District Court in the case of *Shapiro vs.*

United States, 196 Fed., 268, and in the case of *Blum vs. United States,* 196 Fed., 269.

In the Shapiro case, it appears that the indictment in some counts charged offenses which demanded a penalty of imprisonment without the alternative of a fine, and that other counts demanded penalties of either imprisonment or a fine, or both. It also appears from the record that the district attorney entered *nolle prosequi* as to those counts, the penalty for which was either a fine or imprisonment, or both, and that the plea of *nolo contendere* was accepted by the District Court as to those counts which required imprisonment, and that thereupon the Court sentenced Shapiro to imprisonment for two years and pay a fine in the sum of $10.000 in addition to the costs. The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause, with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed thereupon in conformity with law. It seems that thereupon the District Court refused to accept the plea of *nolo contendere,* (probably for the reason that only prison counts remained), and directed the defendant to plead to the indictment. The defendant stood mute and the Court entered for him a plea of not guilty. Subsequently, by leave of Court, the plaintiff filed three special pleas to which the Government demurred and the District Court, sustaining the demurrers, proceeded to trial. The jury rendered a verdict of guilty, and the defendant was sentenced to imprisonment for two years and to pay a fine of $5,000. The case was then brought directly to the Supreme Court of the United States and is reported in 235 U. S., 412.

The Supreme Court granted the motion to dismiss because of lack of jurisdiction, but we submit that the opinion of the Supreme Court is an affirmation of the decision in the Tucker case, 196 Fed., 260, and we quote from the decision of the Supreme Court in the Shapiro case as follows:

> "* * * Shapiro sued out a writ of error from the Circuit Court of Appeals, assigning as errors (1) that the District Court had no jurisdiction to pass judgment in this case on a plea of *nolo contendere:* (2) that it erred in sentencing him without a trial by jury; (3) that by the judgment he had been deprived of his liberty without due process of law, within the meaning of the Fifth Amendment; and (4) that the sentence was excessive and should be limited to a fine only. The Circuit Court of Appeals reversed the judgment, 196 Fed. Rep., 268. The grounds of the reversal are set forth in its opinion in *Tucker vs. United States*, 196 Fed. Rep., 260,—a case, decided at the same time, which the court deemed to be similar in all material respects. It was held that the plea of *nolo contendere* was not authorized in the case of an offense which must be punished by imprisonment, with or without a fine; *that where counts charging offenses which must be punished by imprisonment are joined with counts charging those which may be punished by fine only, the plea may be entertained as 'in the nature of a compromise';* and that in such case it is 'within the authority of the prosecuting officer to elect to stand, for the purposes of the plea, on the counts applicable thereto,' and it is 'within the jurisdic-

tion of the court to approve such submission.' It was further held that in the particular case the proceedings and judgment were in derogation of the plea; that it did not appear in the record that the plea was either 'accepted in fact' or 'substantially so treated'; that the proceedings leading to the judgment, the adjudication of guilt, and the *judgment itself in its sentence of imprisonment, were inconsistent with the acceptance of the plea;* and hence that the record failed to show an authorized plea to support the judgment. *Id.*, pp. 267, 268. The cause was remanded 'with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed thereupon in conformity with law.' ".

"* * * The motion to dismiss must be granted. *Aspen Mining Co. vs. Billings,* 150 U. S., 31; *Brown vs. Alton Water Co.,* 222 U. S., 325; *Metropolitan Water Co. vs. Kaw Valley District,* 223 U. S., 519; *Union Trust Co. vs. Westhus,* 228 U. S., 519. The duty of the District Court was defined by the decision of the Circuit Court of Appeals and in its further proceedings it was bound to apply the principles which that court had laid down for its guidance. It may not have been observed by the appellate court that, in the case of Shapiro, the Government had entered a *nolle prosequi* as to the counts charging an offense which might be punished by fine alone; but this being the actual state of the record, it cannot be doubted that, reading the mandate of the appellate court in the light of its opinion, the District Court was not free to accept the plea of *nolo contendere*

as applicable to the remaining 'prison counts.' Its obedience to the mandate under the law as declared by the Circuit Court of Appeals required it with respect to these counts upon which the Government stood to reject the plea of *nolo contendere* and to proceed with the case. It is now assigned as error that the District Court did set aside this plea. It is insisted that the plea had been accepted when originally tendered, but this is negatived by the ruling of the Circuit Court of Appeals and we are in substance asked to revise its decision upon a writ of error to the District Court. This would be to transcend the limits of our jurisdiction as it has been clearly defined in the cases cited." (Italics ours.)

We submit the following from *Ruling Case Law* and *Corpus Juris*:

"The allowance of the 'implied confession' as a *nolo contendere* plea, thus defined to be the defendant's yielding to mercy in the punishment, 'and desiring to submit to a small fine' necessarily implies that the case for such allowances must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offenses may as well be punished by imprisonment at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce payment of the fine. That such desire (or request, express or implied) on the part of the accused 'to submit to a small fine' can neither serve to limit the fine to the minimum prescribed for the offense, nor constitute the measure of fine which may be im-

posed within the exercise of judicial discretion—that 'a small fine' is thus mentioned in the rule as a relative term, intending substantially less than the maximum,—there is no doubt. So defined, the rule affords no ground for entertaining the plea either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor, for which the punishment must be imprisoned for any term, with or without a fine."

Ruling Case Law, 8 R. C. L., Page 117.

"Under the common-law rule which governs in the federal courts, to authorize the court to entertain a plea of *nolo contendere*, the case must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offense may be punishable as well by imprisonment, at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce payment of the fine; and such plea cannot be accepted either in cases of felony requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any time, with or without fine."

Corpus Juris, Criminal Law, Page 405.

Instruction to United States Marshals, Attorneys, Clerks and Commissioners, July 1, 1925, page 178, reads:

"*Pleas of Nolo Contendere* 1060. In any case where the statute upon which the indictment is based requires imprisonment as the sole or

partial punishment, consent should be refused to the plea of *nolo contendere* and objection made to its acceptance, as such acceptance would prevent punishment by imprisonment. It should be accepted only in cases punishable solely by fine. (See 196 Fed., 260, and 235 U. S., 412)."

Section 222, Vol. 1, Zolines Federal Criminal Law and Procedure, reads as follows:

"The plea of *nolo contendere* is a declaration on the part of the defendant that he will not contend with the prosecution. Under the common law rule, which governs in our Federal Courts, the plea of *nolo contendere* was in the nature of a motion to submit to a small fine and was taken only in cases of slight misdemeanors. Hence imprisonment cannot be imposed upon a plea of *nolo contendere*."

It is respectfully submitted that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the decision in the Tucker case as interpreted by Ruling Case Law, *Corpus Juris,* Zoline's Criminal Law, and the Attorney General of the United States, and will result in untold confusion in the various Federal Courts unless the question is clarified by a decision of the Supreme Court of the United States.

Respectfully submitted,

.....

.....

Attorneys for Petitioner.

Notice of Application to the Supreme Court for a Writ of Certiorari.

The respondent is hereby notified that the petitioner will, on Monday, the ..... day of ...., A. D. 1926, upon his petition and a copy of the entire record in this cause, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for writ of *certiorari,* and brief in support thereof, as hereinbefore set forth, are herewith delivered to you) to the Supreme Court of the United States in its court room at the Capitol in the City of Washington, D. C.

.....

.....

Attorneys for Petitioner.

Service of the foregoing notice is hereby accepted, and the delivery of a copy thereof and of the petition for writ of *certiorari* and brief in support thereof, referred to therein, are hereby acknowledged this ..... day of ....., A. D. 1926.

.....

Attorney for Respondent.

Office Supreme Court, U. S.
FILED
OCT 7 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926
NO. 307.

C. A. HUDSON and R. R. BROGAN, Petitioners,

v.

THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS.

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THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS.

Statement of the Case.

The Petitioners, on the 3rd day of February, 1925, waived arraignment and pleaded *nolo contendere* (R. 19) in open court before His Honor, Robert M. Gibson, Judge of the United States District Court for the Western District of Pennsylvania, at Pittsburgh, Pennsylvania, to an indictment (R. 3) containing six counts, the first five counts charging the defendants with having violated Section 215 of the Criminal Code, *i. e.*, using the mails to defraud, and the sixth count, charging the defendants with violating Section 37 of the Criminal Code, *i. e.*, conspiring to commit the offenses charged in the first five counts of the indictment. On February 14, 1925 (R. 19), the Petitioners were each sentenced to be imprisoned in the Federal Penitentiary at Atlanta, Georgia, for and during the period of one year and one day.

The case was duly appealed to the Circuit Court of Appeals for the Third Circuit from the District Court of the United States for the Western District of Pennsylvania, and came on to be heard by the Circuit Court of Appeals at No. 3335 on the 15th day of October, 1925, and on the 3rd day of December, 1925, the opinion of the Circuit Court of Appeals (R. 23) was delivered and filed, affirming the judgment of the District Court.

Question Involved.

Is a Federal Court, after accepting a plea of *nolo contendere,* authorized to impose a sentence of imprisonment?

Argument.

The District Court below erred in imposing on the defendants a sentence of one year and one day to the Federal Penitentiary at Atlanta, Georgia, after accepting a plea of *nolo contendere,* and the Circuit Court of Appeals for the Third Circuit should have reversed the judgment below for the reasons assigned in the said record in this case. The opinion of the Circuit Court of Appeals (R. 23) is reported in 9 Fed. R., 2 Ed., page 825.

In the case of *Tucker v. United States,* 196 Fed., 260, decided by the Circuit Court of Appeals, Seventh Circuit, January 2, 1912, the effect of a plea of *nolo contendere* was involved and decided contrary to the decision of the Circuit Court of Appeals, Third Circuit, in the present case.

The conclusion of the opinion of the Circuit Court of Appeals in the case at bar (R. 23) reads (*Hudson et al. v. U. S.,* 9 Fed., 2d Ed., p. 825):

> (a) "The plea of *nolo contendere* is not applicable, and, if tendered, cannot be accepted in a case where, under a statute, the punishment *must* be by imprisonment, with or without a fine; (b) but it is applicable, and, if tendered, may be accepted in a case where the punishment *may* be by fine alone, although the offense may as well be punishable by imprisonment; and (c) when so tendered and accepted the sentence may, in the court's discretion, prescribe both fine and imprisonment, or imprisonment or fine alone—in any event without limitation (except that of the statute) upon the size of the penalty."

The effect of this is that a Federal Court may not impose a prison sentence upon a plea of *nolo contendere* if the statute demands imprisonment, but may do so if the statute permits imprisonment. It is respectfully submitted that this is wholly irreconcilable with the opinion in *Tucker v. United States*, 196 Fed., 260 U. S. Circuit Court of Appeals, Seventh Circuit, which declares:

> "The rule affords no ground for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed upon conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any term with or without fine."

The necessary effect of this is that the Court may not impose sentence of imprisonment upon the plea of *nolo contendere.*

The penalty provided in Section 215 of the Criminal Code, covered by the first five counts in the indictment (R3), is a fine of not more than $1,000.00 or imprisonment of not more than five years, or both, and the penalty provided in Section 37 of the Criminal Code, covered by the sixth count in the indictment, is a fine of not more than $10,000.00 or imprisonment of not more than two years or both. It will be observed that neither of these sections demand the penalty of imprisonment as each section provides that the penalty may be either fine or imprisonment or both. It is the position of the Petitioners that a Federal Court is without power to accept a plea of *nolo contendere* if the statute involved requires imprisonment, but that the plea may be accepted where the statute involved provides for a penalty of fine or imprisonment, and that in such cases, when a plea of *nolo contendere* is accepted, a Federal Court is without power to impose any penalty of imprisonment or, in other words, is limited to imposing nothing more than a fine.

It does not appear in the record in this case, but a perusal of the indictment in the *Tucker case* shows that the indictment charged violations of Sections 3296, 3326, 3324, 3455 and 3317 of the Revised Statutes. The punishment for violating Section 3455 R. S. is "a fine of not less than $1,000.00 nor more than $5,000.00, or to imprisonment for not less than six months or more than five years, or to both, at the discretion of the Court." Concerning this, the Court in the *Tucker case* said:

> "So it was within the authority of the prosecuting officer to elect to stand, for the purpose of the plea, on the counts applicable thereto, and was plainly within the jurisdiction of the court to approve such submission. Were the subsequent proceedings consistent with acceptance of the plea in that view, we are satisfied that no reversible error would appear in allowance thereof. * * * Moreover, the judgment is alike inconsistent with acceptance of the plea as above defined, in pronouncing imprisonment in the penitentiary for eighteen months."

The *Tucker case*, therefore, clearly decides that the plea was properly accepted in that case as applying to certain counts which contained charges punishable by fine or imprisonment or both, but that imprisonment in the penitentiary for eighteen months was "inconsistent with acceptance of the plea."

We beg to quote further from the *Tucker case*, 196 Fed., 260, as follows:

> "(2) The allowance of the 'implied confession' as a *nolo contendere* plea, thus defined to be the defendant's yielding to mercy in the punishment, 'and desiring to submit to a small fine,' necessarily implies, as we believe, that the case for such allowance must be

within the class of misdemeanors for which punishment may be imposed by *fine alone,* although the offense may as well be punished by imprisonment, at the discretion of the court, either as an alternative of fine, or in addition thereto, or to enforce payment of the fine. That such desire (or request, express or implied) on the part of the accused 'to submit to a small fine' can neither serve to limit the fine to the minimum prescribed for the offense, nor constitute the measure of fine which may be imposed within the exercise of judicial discretion—that 'a small fine' is thus mentioned in the rule as a relative term, intending substantially less than the maximum—we have no doubt. This provision, however, for such purpose in the submission—as the object sought by the defendant in electing to submit without contest—requires construction of the rule accordingly, as limited to cases consistent with the purpose thus declared. So defined, the rule affords no ground for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any term, with or without a fine. Constrained to this interpretation of the narrow purpose and use of the plea at common law, by the express provisions of the rule thus handed down, we believe extension of the allowance to include even misdemeanors for which imprisonment must be imposed is unauthorized—however desirable it may seem—without statutory provision therefor. In arriving at such conclusion, we have not overlooked the settled doctrine that such short terms of imprisonment were not "infamous punishments" as defined in England and America for more than a century (see *Mackin v. United States,* 117 U. S., 348, 351, 6 Sup. Ct., 777, 29 L. Ed., 909, and *Fitzpatrick v. United States, ante*), nor the

fact that imprisonment, at the time the rule was adopted, was frequently made the alternative of fines, or imposed together with a fine for 'crimes of inferior nature' (*2 Cooley's Black,* book 4, p. 5), 'in which the public punishment is not severe, but affords room for private compensation'—imposed also for commercial indebtedness—and was regarded with far less opprobrium than attaches to every form of imprisonment at the present day. Neither of these considerations appears to have entered into the framing of the rule, and we are not at liberty to adopt a different rule for application to the case at bar.

(3) The contention, however, that the trial court was without jurisdiction to allow the plea under the indictment in the present case, we believe to be untenable, notwithstanding the foregoing interpretation of the rule. It is undoubted that the counts of the indictment, charging an offense for which at least three months' imprisonment must be imposed with a fine, are not within such interpretation, but other counts (as above mentioned) charged offenses which *may be punished by fine alone, and thus furnish ground for entertaining the nolo contendere plea,* as 'in the nature of a compromise' between the prosecutor and the defendant."

* * * * * * * *

"That these proceedings and recitals leading up to the judgment are inconsistent with acceptance of the *nolo contendere plea* as tendered must be presumed, as we believe, under either of the contentions for interpretation of the rule. It may be that evidence may be heard under such plea for the purpose of determining *the amount of fine to be imposed,* but no issue is presented for trial under the indictment, and no adjudication of guilt is authorized. *Com. v. Horton,* 9 Pick. (Mass.), 206; *Com. v. Ingersoll,* 145 Mass., 381, 382,

14 N. E., 449. The evidence referred to in the record is not preserved, but no presumption can be indulged, in the light of the various recitals, with no acceptance of the plea mentioned, that the evidence was received otherwise than for the purpose of the finding, upon which the judgment appears to be pronounced. Moreover, the judgment is alike inconsistent with acceptance of the plea, as above defined, in pronouncing imprisonment in the penitentiary for 18 months. The record, therefore, furnishes no ground to support the judgment as resting on acceptance of the plea (*Com. v. Ingersoll, supra*), thus leaving it unsupported for want of either of the authorized pleas to the indictment.

The judgment of the District Court is reversed, accordingly, and the cause is remanded, with direction either to accept or refuse acceptance of such plea as tendered, and proceed thereupon in conformity with law." (Italics ours.)

On the same day, the same Court, basing its decisions on the reasons set forth in the *Tucker case*, reversed the District Court in the case of *Shapiro v. United States*, 196 Fed., 268, and in the case of *Blum v. United States*, 196 Fed., 269.

In the *Shapiro case* it appears that the indictment in some counts charged offenses which demanded a penalty of imprisonment without the alternative of a fine, and that other counts demanded penalties of either imprisonment or a fine, or both. It also appears from the record that the district attorney entered *nolle prosequi* as to those counts, the penalty for which was either a fine or imprisonment, or both, and that the plea of *nolo contendere* was accepted by the District Court as to those counts which required imprisonment, and that thereupon the Court sentenced Shapiro to imprisonment for two years and pay a fine in the sum of $10,000 in addition to the costs. The Circuit

Court of Appeals reversed the judgment of the District Court and remanded the cause, with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed thereupon in conformity with law. It seems that thereupon the District Court refused to accept the plea of *nolo contendere* (probably for the reason that only prison counts remained), and directed the defendant to plead to the indictment. The defendant stood mute and the Court entered for him a plea of not guilty. Subsequently, by leave of Court, the plaintiff filed three special pleas, to which the Government demurred, and the the District Court, sustaining the demurrers, proceeded to trial. The jury rendered a verdict of guilty, and the defendant was sentenced to imprisonment for two years and to pay a fine of $5,000. The case was then brought directly to the Supreme Court of the United States and is reported in 235 U. S., 412. The Supreme Court granted the motion to dismiss because of lack of jurisdiction, but we submit that the opinion of the Supreme Court is an affirmation of the decision in the *Tucker case*, 196 Fed., 260, and we quote from the decision of the Supreme Court in the *Shapiro case* (235 U. S., 412, at p. 413) as follows:

> "* * * Shapiro sued out a writ of error from the Circuit Court of Appeals, assigning as errors (1) that the District Court had no jurisdiction to pass judgment in this case on a plea of *nolo contendere;* (2) that it erred in sentencing him without a trial by jury; (3) that by the judgment he had been deprived of his liberty without due process of law, within the meaning of the Fifth Amendment; and (4) that the sentence was excessive and should be limited to a fine only. The Circuit Court of Appeals reversed the judgment, 196 Fed. Rep., 268. The grounds of the reversal are set forth in its opinion in *Tucker v. United States*, 196 Fed. Rep., 260—a case, decided at the same time,

which the court deemed to be similar in all material respects. It was held that the plea of *nolo contendere* was not authorized in the case of an offense which must be punished by imprisonment, with or without a fine; *that where counts charging offenses which must be punished by imprisonment are joined with counts charging those which may be punished by fine only, the plea may be entertained as 'in the nature of a compromise';* and that in such case it is 'within the authority of the prosecuting officer to elect to stand, for the purposes of the plea, on the counts applicable thereto,' and it is 'within the jurisdiction of the court to approve such submission.' It was further held that in the particular case the proceedings and judgment were in derogation of the plea; that it did not appear in the record that the plea was either 'accepted in fact' or 'substantially so treated'; that the proceedings leading to the judgment, the adjudication of guilt, and the *judgment itself in its sentence of imprisonment, were inconsistent with the acceptance of the plea;* and hence that the record failed to show an authorized plea to support the judgment. *Id.,* pp. 267, 268. The cause was remanded 'with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed thereupon in conformity with law.'" *Idem,* at p. 415.

"* * * The motion to dismiss must be granted. *Aspen Mining Co. v. Billings,* 150 U. S., 31; *Brown v. Alton Water Co.,* 222 U. S., 325; *Metropolitan Water Co. v. Kaw Valley District,* 223 U. S., 519; *Union Trust Co. v. Westhus,* 228 U. S., 519. The duty of the District Court was defined by the decision of the Circuit Court of Appeals and in its further proceedings it was bound to apply the principles which that court had laid down for its guidance. It may not have been observed by the appellate court that, in the case

of Shapiro, the Government had entered a *nolle prosequi* as to the counts charging an offense which might be punished by fine alone; but this being the actual state of the record, it cannot be doubted that, reading the mandate of the appellate court in the light of its opinion, the District Court was not free to accept the plea of *nolo contendere* as applicable to the remaining 'prison counts.' Its obedience to the mandate under the law as declared by the Circuit Court of Appeals required it with respect to these counts upon which the Government stood to reject the plea of *nolo contendere* and to proceed with the case. It is now assigned as error that the District Court did set aside this plea. It is insisted that the plea had been accepted when originally tendered, but this is negatived by the ruling of the Circuit Court of Appeals and we are in substance asked to revise its decision upon a writ of error to the District Court. This would be to transcend the limits of our jurisdiction as it has been clearly defined in the cases cited." (Italics ours.)

We submit the following from *Ruling Case Law* and *Corpus Juris.*:

"The allowance of the 'implied confession' as a *nolo contendere* plea, thus defined to be the defendant's yielding to mercy in the punishment, 'and desiring to submit to a small fine' necessarily implies that the case for such allowances must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offenses may as well be punished by imprisonment at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce payment of the fine. That such desire (or request, express or implied) on the part of

the accused 'to submit to a small fine' can neither serve to limit the fine to the minimum prescribed for the offense, nor constitute the measure of fine which may be imposed within the exercise of judicial discretion—that 'a small fine' is thus mentioned in the rule as a relative term, intending substantially less than the maximum—there is no doubt. So defined, the rule affords no ground for entertaining the plea either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor, for which the punishment must be imprisoned for any term, with or without a fine."

Ruling Case Law, 8 R. C. L., page 117.

"Under the common-law rule which governs in the federal courts, to authorize the court to entertain a plea of *nolo contendere*, the case must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offense may be punishable as well by imprisonment, at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce payment of the fine; and such plea cannot be accepted either in cases of felony requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any time, with or without fine."

16 Corpus Juris, Criminal Law, page 405.

Instruction to United States Marshals, Attorneys, Clerks and Commissioners, July 1, 1925, page 178, reads:

"*Pleas of Nolo Contendere*, 1060. In any case where the statute upon which the indictment is based requires imprisonment as the sole or partial punishment, consent should be refused to the plea of *nolo*

contendere and objection made to its acceptance, as such acceptance would prevent punishment by imprisonment. It should be accepted only in cases punishable solely by fine. (See 196 Fed., 260, and 235 U. S., 412)"

Section 222, Vol. 1, *Zolines Federal Criminal Law and Procedure,* reads as follows:

"The plea of *nolo contendere* is a declaration on the part of the defendant that he will not contend with the prosecution. Under the common law rule, which governs in our Federal Courts, the plea of *nolo contendere* was in the nature of a motion to submit to a small fine and was taken only in cases of slight misdemeanors. Hence imprisonment cannot be imposed upon a plea of *nolo contendere.*"

The plea of *nolo contendere* is in the nature of a compromise between the Government and the defendant. It is not a conviction, and is not an acknowledgment of guilt. The Petitioners in the present case, without being convicted, without a trial, and without an acknowledgment of guilt, were each sentenced one year and one day to the Federal Penitentiary at Atlanta, Georgia.

It is respectfully submitted that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the common law and is in conflict with the decision in the *Tucker case* as interpreted by *Ruling Case Law, Corpus Juris, Zoline's Criminal Law,* and the Attorney General of the United States.

Respectfully submitted,

B. B. McGinnis,
Frank P. Patterson,
Attorneys for Petitioners.

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Act of March 4, 1925 (Probation Act), c. 521, 43 Stat. 1259—
Sec. 1 ... 22
Sec. 2 ... 23
Criminal Code, Sec. 215 ... 2
Massachusetts Statutes of 1855, c. 215, Sec. 35 ... 29

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 307

C. A. HUDSON AND R. R. BROGAN, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 23) is reported in 9 F. (2d) 825.

JURISDICTION

The judgment to be reviewed was entered by the Circuit Court of Appeals December 3, 1925. (R. 25.) Petitions for certiorari were filed March 2, 1926. The writ was allowed April 19, 1926. (R. 26.)

THE QUESTION

The question presented is whether on receiving a plea of *nolo contendere* a United States Court

may impose a prison sentence. There is no controlling statute, and decision depends on the nature of that plea at common law.

STATEMENT

Petitioners were indicted for using the mails to defraud (R. 3), a crime punishable by fine or imprisonment or both (Section 215, Criminal Code). They entered pleas of *nolo contendere* (R. 19) and were thereupon sentenced to imprisonment in the Atlanta Penitentiary for one year and one day (R. 19). They sued out writs of error from the Circuit Court of Appeals for the Third Circuit, assigning as error that the sentence to imprisonment on a plea of *nolo contendere* was erroneous. (R. 20, 21.) The Circuit Court of Appeals affirmed the judgment and sentence. (R. 25.) The present writs are to review that judgment.

ARGUMENT

SUMMARY

Nolo contendere is not pleadable of right, but only by permission of the court. It is probably not proper to accept it where the punishment is capital. With these exceptions it is the same thing, so far as proceedings on the indictment are concerned, as the ordinary plea of guilty. The only further difference between the pleas is that following a plea of guilty the defendant cannot deny the facts charged when later sued by a private individual, while following nolo contendere he can. Any

sentence (except death) prescribed for the crime charged may be imposed equally on either plea.

The question for decision in this case is the subject of difference in the inferior Federal courts. The court below held in this case that the sentence of imprisonment was proper on the plea. 9 F. (2d) 825. In *Tucker* v. *United States,* 196 Fed 260, the Circuit Court of Appeals for the Seventh Circuit reached the contrary result. The same court at the same time decided *Shapiro* v. *United States,* 196 Fed. 268. That case returned to the District Court, where proceedings under the mandate of the Circuit Court of Appeals resulted in conviction by a jury and another sentence of imprisonment. That judgment was sought to be brought directly to this Court by writ of error. This Court dismissed the writ, because the review asked for was really of the judgment of the Circuit Court of Appeals and so could not be had "otherwise than by proceedings addressed directly to that court." *Shapiro* v. *United States,* 235 U. S. 412. In the course of its opinion this Court stated the substance of the decision in the *Tucker case,* but it is clear that it then neither approved nor disapproved it. The question has not elsewhere been considered by this Court and is therefore at large here for original consideration. Since decision depends on the nature of the plea at common law, it will be convenient to state the common law authorities historically.

I

THE ENGLISH AUTHORITIES

The existence of such a thing as a separate plea of "nolo contendere" rests chiefly on the authority of Serjeant William Hawkins. He says (*Pleas of the Crown,* Book 2, Chapter Thirty-first, "Of Confession and Demurrer"):

> And now I am to consider what is to be done to a prisoner upon his confession; which may be either Express, or Implied.
>
> SECT. 1. An express confession is where a person directly confesses the crime with which he is charged, which is the highest conviction that can be, and may be received after the plea of not guilty recorded, notwithstanding the repugnancy; for the entry is, That the defendant *postea* or *relicta verificatione, cognovit indictamentum.*
>
> SECT. 2. Such a confession carries with it so strong a presumption of guilt, that an entry on record *quod cognovit indictamentum,* etc., in an indictment of trespass, estops the defendant to plead not guilty to an action brought afterwards against him for the same matter. * * *
>
> SECT. 3. An implied confession is where a defendant in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam*

> *regis,* without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum.*

Hawkins nowhere further carries out his promise "to consider what is to be done to a prisoner upon his confession." If there is a difference between the punishment that may be imposed upon express and upon implied confession it is not stated by him, unless what is quoted above means that upon the prisoner's yielding to mercy "and desiring to submit to a small fine" the court is limited accordingly.

The authorities cited opposite Section 3 (above) in Hawkins (6 Ed. 1787) are two cases in the Year Books (9 H.6.60; 11 H.4.65, 21), Lambard's Justice of the Peace (printed in 1614), Viner's Abridgment, and a case in Farrelly.

The Year Book cases in 11 Henry IV have no apparent bearing on the question. The extract in 9 Henry VI is an argument in the midst of an unrelated case. The matter bearing on *nolo contendere* is as follows (9 Henry VI, 59, at 60). (For the translation counsel are indebted to Professor J. H. Beale of the Harvard Law School.)

> WESTON. If one be indicted for Trespass, and he surrenders and pays a fine, will he be permitted afterwards to plead Not Guilty?
>
> PASTON. (J.) Yes; certainly.

Which was agreed by all the Court.

WESTON. It is of record that he admitted it.

BABBINGTON. If the entry be so, he will be estopped; but the entry is not so, but is thus, that he put himself on the grace of our Lord the King, and asked that he might be allowed to pay a fine (petit se admittit per finem). Therefore if one be indicted for felony, and has a charter of pardon, and pleads it, and prays that it be allowed, this does not prove that he is guilty; but the King has excluded himself (from claiming guilt) by his charter (of pardon). And I and all the Court are against you on this point.

The case cited by Hawkins from Farrelly is believed to be the same as that reported in 1 Salkeld 55 (*The Queen* v. *Templeman*), as follows:

> Upon a motion to submit to a small fine, after a confession of the indictment which was for an assault, Holt, Chief Justice, took a difference where a man confesses an indictment, and where he is found guilty; in the first case a man may produce affidavits to prove *son assault* upon the prosecutor in mitigation of the fine; otherwise where the defendant is found guilty; for the entry upon a confession is only *non vult contendere cum domina regina & pon. se in gratiam Curiae.*

Two differences will be noted between this statement and the statement made by Hawkins: (1) The distinction stated is not between express and implied confession but between any confession and

conviction after trial; (2) on confession (apparently express) the entry is *non vult contendere,* etc., instead of *quod cognovit indictamentum,* as in Hawkins, and therefore the prisoner is not estopped to show that the prosecutor started the affray. In other words, *non vult contendere* is the entry on a plea of guilty and not something different. Nevertheless this case, on account of the use of the words "*non vult contendere,*" is generally cited as authority for a separate plea under that name.

Comyns' Digest (Indictment (K.) Confession) says:

> If the defendant appears, or be brought in by process, he shall confess, or traverse the indictment.
>
> If he confesses the indictment, he admits himself guilty.
>
> * * * * *
>
> And there shall be judgment against him.
>
> And in an action for the same trespass, his confession shall be evidence against him. 9 H. 6, 60.a.
>
> * * * * *
>
> So, a man may *ponere se in gratiam regis,* and pray that he may be admitted by fine. 9 H. 6, 60.a.
>
> And such a confession does not conclude him. 9 H. 6, 60.a.
>
> And he may give affidavits of a first assault, etc., by the prosecutor, for mitigation of the fine. I Sal. 55.

In *Viner's Abridgment* the following appears (Estoppel, F., Vol. 10, p. 435–6):

28. In trespass the defendant pleaded *not guilty,* and the plaintiff estopped him, *because he was indicted thereof at another time, and traversed it, and said it was of the assault of the plaintiff,* and so to issue, and after waived it and confessed the traverse, and held that this confession is good estoppel to plead not guilty, and also to justify de son assault demesne, so that he shall not plead the one nor the other contrary to his confession. Br. Estoppel, pl. 64, cites 11 H. 4, 65.

* * * * *

35. *If a man indicted of extortion or trespass puts himself into the grace of the king,* and *makes fine,* and *after the party sues* against him thereof *by bill or writ,* and he pleads not guilty, he shall have the plea, and the making of fine to the king shall not estop him. Br. N. C. Pemp. H. 8, pl. 367 (bis.).

36. *For* the *entry* is *quod pettit se admitti per finem,* and *does not confess it precisely,* and therefore it is no estoppel. But Brook seems to make the fine by protestation that he is not guilty, and then this is all clear. *Ibid.*

Sir Matthew Hale (*Historia Placitorum Coronae*) says nothing indicating that he thinks "nolo contendere" has a separate existence. He sets out (Vol. 2, Chap. 29) two forms of confessions, but they are not express and implied, as in Hawkins, but "either simple, or relative in order to the attainment of some other advantage." A "simple" confession is, of course, a plea of guilty. The other form "is either where the prisoner confesseth the felony in

order to his clergy, * * * or where he confesseth the offense, and appealeth others thereof, thereby to become an approver, and thereupon to obtain his pardon, if he convict them." There is in Hale's discussion no mention of any other confession than these two, nor any plea resembling the form discussed by Hawkins.

Blackstone is equally silent as to the existence of this plea. He treats criminal pleading in some detail (Book IV: Chap. 25, of Arraignment and its Incidents; Chap. 26, of Plea, and Issue), but makes no reference to *nolo contendere* or to anything that might be the same thing.

Chitty reproduces substantially the statement made by Hawkins. He says (*The Criminal Law*, Vol. I, pages 428, 431):

> The last incident of the arraignment is confession. This may be either express or implied. An express confession of the indictment is, where the party pleads *guilty*, and thus directly, in the face of the court, confesses the accusation. This is the highest kind of conviction of which the case admits. * * *
>
> An *implied confession* is where, in case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the King's mercy, and desiring to submit to a small fine, which the court may either accept or decline, as they think proper. If they grant the request, an entry is made to this effect, that the defendant "non vult contendere cum

> domina regina et posuit se in gratiam curiae," without compelling him to a more direct confession. The difference in effect between an implied, and an express confession is, that after the latter, not guilty can not be pleaded to an action of trespass for the same injury; whereas it may at any time be done after the former.

The authorities cited in Chitty to support this paragraph are Hawkins, Comyns' Digest, and the case in I Salkeld, all set out at length above, and manuals of Burn and Williams.

This is the extent of the authorities in England. From this point on *nolo contendere* entirely disappears. A fairly careful search through the leading modern English textbooks, digests, and authorities, fails to reveal any reference whatever to the existence of the plea in any book since Chitty. There is, it is believed, at this time no such plea in England.

Having arrived at this conclusion, counsel have endeavored to confirm it by asking the opinion of Sir John Simon, formerly the Attorney General of England. Sir John writes us under date of August 20, 1926:

> The plea to which you refer is unknown in English procedure, and indeed I never heard of it, and do not fully understand what its effect is supposed to be. We have modernized our criminal practice here for purposes of simplicity and speed long ago, and apart from the ordinary plea of

> "guilty" or "not guilty," which is expressed verbally, the only other pleas by a defendant in a criminal case of which I have any knowledge would be a plea of pardon, or previous conviction, or acquittal, or (in criminal libel) of justification and public interest. Even a plea to the jurisdiction need not be formally entered, but can be raised under the general issue. * * * However, you may take it as *quite certain* that in this country these archaic matters have long since been swept away.

The English authority may then be summarized as follows: The existence of *nolo contendere* as something separate from a simple plea of guilty rests ultimately upon two rather ambiguous discussions in the reported cases and practically upon the authority of Hawkins and the older digests. The incidents of the plea, as disclosed by these authorities, were two: (1) It did not estop the defendant to deny the same facts in a civil case, and (2) the defendant threw himself upon the mercy of the court, and "desired to submit to a small fine." It is not stated in any English book so far as we can find that the court, if it accept the plea, is limited to fining the defendant. The defendant desires to be let off with a fine, but he also desires not to be estopped in a private action for the same offence, and therefore he throws himself on the mercy of the court. What the court may then do with him does not appear.

II

THE AMERICAN AUTHORITIES

As a contrast to the complete modern extinction of the plea of *nolo contendere* in England, its use in this country has continued and increased. Some States, indeed, decline to recognize it as not authorized by local codes. But it is elsewhere recognized, and the cases in all States where it is used, as far as we can find, and in the Federal courts except for the one case of *Tucker* v. *United States,* support the proposition that as to all proceedings upon the indictment the plea is the equivalent of that of guilty.

The leading cases are in the New England States. In *Commonwealth* v. *Horton*, 9 Pickering 206, the court said by Mr. Justice Putnam (at p. 207):

> The plea of *nolo contendere* is an implied confession of the offence charged. It is discretionary with the court to receive it, or not.
>
> The advantage which a party obtains by such an answer properly pleaded, is, that he is not estopped to plead *not guilty* to an action for the same facts, as he would be upon a plea of *guilty.* For in the latter case the entry is "*quod* cognovit *indictamentum,*" but in the former, "*non vult contendere cum domina regina, et ponit se in gratiam curiae.*" 2 Hawk. c. 31, Sec. 3, *Queen* v. *Templeman,* I Salk. 55, pl. 6.
>
> Another advantage of the plea of *nolo contendere* was, that the party might be ad-

mitted to prove *son assault* upon the prosecutor, in mitigation of the fine.

In our practice, however, the court will allow a party to offer evidence in mitigation of the sentence, after the plea of *guilty,* and *a fortiori,* after a plea of *nolo contendere.* It is only where the party is sued in a civil action for doing the thing for which he was indicted (as for a trespass, Bro. *Estop. pl.* 132—Vin. *Estop. F, pl. 36*), that the distinction between these pleas is material. The plea of *nolo contendere* pleaded with a protestation that the party was not guilty, would clearly not conclude the party in his defense against the civil action.

But so far as the commonwealth is concerned, the judgment of conviction follows as well the one plea, as the other. And it is not necessary that the *court* should adjudge that the party was guilty, for that follows by necessary legal inference from the implied confession. But the court thereupon proceeds to pass the sentence of the law affixed to the crime.

In *Commonwealth* v. *Tilton,* 8 Metcalf 232, Chief Justice Shaw said for the court (p. 233):

This plea, like a demurrer, admits, for the purposes of the case, all the facts which are well stated, but is not to be used as an admission elsewhere; and upon a motion in arrest of judgment, the only question is, whether the count sets forth any indictable offence.

In *Commonwealth* v. *Ingersoll,* 145 Mass. 381, the statement made in *Commonwealth* v. *Horton* is summarized and substantially repeated. The law in Massachusetts remains the same down to the present day. *Commonwealth* v. *Marino,* 150 Northeastern Reporter, 841 (Feb. 24, 1926).

In *State* v. *Siddall,* 103 Maine, 144, the court said (page 146):

> "A plea of *nolo contendere* when accepted by the court, is, in its effect upon the case, equivalent to the plea of guilty. * * * The judgment of conviction follows upon such a plea as well as upon a plea of guilty, and such a plea if accepted, can not be withdrawn and a plea of not guilty entered except by leave of court." *Commonwealth* v. *Ingersoll,* 145 Mass. 381.

In *State* v. *O'Brien,* 18 Rhode Island, 105, the court said (at page 107):

> The plea of *nolo contendere* interposed by the defendant, like a demurrer, admits for the purposes of the case, all the facts which are well pleaded. That is to say, it is a confession of guilt, so far as this particular case is concerned, and places the defendant in the same position for the purposes of this motion, as though he had pleaded guilty, or been found guilty by the verdict of a jury.

In *State v. Fagan,* 64 New Hampshire 431, the question was whether one who had pleaded *nolo contendere* to a liquor charge . . been fined could be prosecuted for another act of the same sort as

for a "subsequent offence." The court held that he could, saying (p. 432):

> The judgment recovered by the state (upon the former plea) is not a compromise in the sense of being something less than a conviction. It could have been rendered on no other ground than the defendant's guilt. It would be invalid if the record showed that he was not guilty, or that the question of his guilt had not been determined against him by plea or by proof. His plea was an implied confession of the offence charged. His guilt was a "necessary legal inference from the implied confession."

In *United States* v. *Hartwell,* Fed. Case No. 15318, the Circuit Court for the District of Massachusetts, upon questions arising on the trial of accessories after plea of *nolo contendere* by the principal, said (26 Fed. Cas. at p. 201):

> Attempt was made at the argument to set up a distinction between the plea of nolo contendere and the plea of guilty, but the suggestion is entitled to no weight as it is well settled that the legal effect of the former is the same as that of the latter, so far as regards all the proceedings on the indictment.

In *Gemignani* v. *United States,* 9 F. (2d) 384, in the Circuit Court of Appeals for the Sixth Circuit, the question was whether one who had pleaded *nolo contendere* to one indictment and been fined could for a later offense be indicted as one before convicted. The court said:

> This plea of nolo contendere was entered as to each count of that indictment, and for the purpose of that case was, in effect, a plea of guilty to both counts.

In none of the cases so far cited does it appear that the defendant was in fact sentenced to imprisonment. That has, however, occurred in sundry other cases and been affirmed in the appellate courts.

In *United States* v. *Lair*, 195 Fed. 47, the Circuit Court of Appeals for the Eighth Circuit denied *habeas corpus* to a prisoner sentenced for two years after pleading *nolo contendere*. The point now made does not seem to have been urged upon the court, whose opinion is chiefly concerned with the sufficiency of the indictment to show jurisdiction. As to the plea the court said (p. 52):

> In fact, the defendant admitted that he committed the offense charged within that district; for his plea of nolo contendere is in effect a plea of guilty to every essential element of the offense well pleaded in the charge against him, and warrants his conviction thereof without more (citing cases) though the conviction can not rightly be used against him in any other case. Such is the effect of the plea of nolo contendere.

In *Commonwealth* v. *Holstine*, 132 Pennsylvania 357, the court approved a sentence to both fine and imprisonment upon this plea, saying simply (p. 361):

> To this indictment he pleaded non volo contendere. This, although not technically a

> plea of guilty, is so in substance, and justifies the court in imposing sentence: *Buck* v. *Commonwealth,* 107 Pa. 486.

In *Commonwealth* v. *Ferguson,* 44 Pennsylvania Superior Court 626, the defendant, on a plea of *nolo contendere,* had been sentenced to imprisonment. He assigned as error that only a fine could be imposed upon the plea, but the court affirmed the sentence. The court said (p. 629):

> It would seem that at one time in England the plea was accepted only in cases where a fine was to be imposed: 2 Hawkins P. C. c. 31, Sec. 3. But in none of the above cited American cases is it decided that if the court accepts the plea, and the offense is punishable by imprisonment, the defendant may not be sentenced to imprisonment. On the contrary, the sentence under consideration in *State ex rel.* v. *Hudson Q. S.,* 46 N. J. L. 112, as well as *Com.* v. *Holstine,* 132 Pa. 357, was to imprisonment. (Quotation from the *Holstine case.*) This clearly implies that the sentence would have been supported by the plea even if the facts of the case had not been brought on the record.

In *Commonwealth* v. *Shrope,* 264 Pennsylvania 246, the principles of these cases were sought to be pushed to extreme limits and reaction resulted. Shrope was indicted for murder and tendered the plea of *non vult contendere,* which the court accepted. A statute provided that where defendant

was "convicted by his own confession" the court without a jury should take evidence to determine the degree of guilt. The trial court proceeded under this statute, determined that Shrope's crime was murder in the first degree, and sentenced him to death. On appeal the court held that *nolo contendere* could not be pleaded in a capital case, and accordingly reversed the judgment and ordered that the accused be permitted to plead over. The court said (at page 249):

> That the plea of non vult contendere is allowable in our jurisdiction, when entered with the leave of court, is conceded. Our reports contain a number of cases where it has been allowed, and the recognition it has received in them is too emphatic to dispute its admissibility under certain conditions; but this court has yet to recognize its applicability beyond cases involving, at most, imprisonment as the penalty, and in allowing it to this extreme limit we have extended it by judicial construction beyond the purpose for which it was originally intended and designed, which was simply to enable one charged with a misdemeanor to commute the penalty affixed by the payment of a fine.

The court's principal authorities for this statement are the passages from Hawkins and Chitty above quoted.

In *State ex rel. Peacock* v. *Judges,* 46 New Jersey Law, 112, Peacock was indicted, pleaded *nolo contendere,* and was sentenced to state prison. He

sued out a writ of error and applied for bail, which the lower court refused, and that refusal was affirmed. The court said (at page 113):

> A plea of *nolo contendere* is an implied confession of the crime of which he is charged. I Burn's Just. 388; 2 Hawk. P. C. 225. The difference between this implied confession and the express confession by plea of guilty is, that after the latter "not guilty" can not be pleaded to an action of trespass for the same injury, whereas it may at any time be done after the former. I Chitty Crim. Law 293. In fact, the only difference between the significance of the two pleas is in the force each has upon a collateral proceeding. The implied confession is only for the purpose of the prosecution in the course of which it is entered, while the plea of guilty in that form may be used against the defendant in a civil suit. I Bish. Crim. Pro., Sec. 802; I Whart. Crim. Law, Sec. 533.
>
> In the same cause the established practice is to treat the plea of *nolo contendere* as operating as an admission of the truth of the charge as fully as if the technical plea of not guilty had been interposed. Judgment is entered, execution of the judgment follows, and the right of review to exactly the same extent is accorded to the defendant who has pleaded not guilty as to him who has gained permission to enter the plea of *nolo contendere*.

(We take it that the phrase "not guilty" where it appears twice in the last paragraph is a clear misprint for "guilty.")

In *Philpot* v. *State,* 65 New Hampshire 250, the defendant was denied habeas corpus where he had pleaded *nolo contendere* to a liquor charge and been sentenced to six months imprisonment. The right to take the plea was granted by a statute, which, however, said nothing about punishment, and the present point was apparently not urged upon the court.

In *State* v. *Burnett,* 174 North Carolina 796, defendant pleaded *nolo contendere,* evidence was taken, and she was sentenced to twelve months in jail. The court affirmed the sentence, saying (p. 797):

> A plea of *nolo contendere,* which is still allowed in some courts, is regarded by some writers as a *quasi*-confession of guilt. Whether that be true or not, it is equivalent to a plea of guilty in so far as it gives the court the power to punish. * * *
>
> The only advantage in a plea of *nolo contendere* gained by the defendant is that it gives him the advantage of not being estopped to deny his guilt in civil action based upon the same facts.

In *Ex Parte Lanni,* 131 Atl. 52; 131 Atl. 927 (Rhode Island 1925), it appeared that Lanni was indicted for assault with a dangerous weapon and pleaded not guilty; that he thereafter withdrew that plea and pleaded *nolo contendere;* that he

thereafter applied for permission to withdraw that plea and plead not guilty, and that the trial court refused permission and sentenced him to the state prison. The Supreme Court permitted review by habeas corpus (131 Atl. 52), but declined to disturb the result (131 Atl. 927).

Certain of these decisions are cited in *Tucker* v. *United States*, and are disposed of by the opinion in that case as follows (196 Fed. at 265):

> We believe these mere instances of fact, appearing alone in the facts of the case without comment in the opinion, are not entitled to consideration and force (persuasive or otherwise) as rulings of the courts respectively, that such pleas were accepted under and within the common-law rule, and that they neither control nor aid the inquiry, whether *nolo contendere* was pleadable in the case at bar.

It must, however, be apparent that these courts would not have affirmed the sentence of imprisonment, as each one did, had they been of opinion that it was not permissible upon the plea. It may also be said as to the *Tucker case* that it goes entirely upon the language of Chitty and of Hawkins, and that language does not say, as we have seen, that on acceptance of the plea the court is limited to a small fine, but only that the defendant "desires to submit to a small fine" and throws himself upon the mercy of the court.

These are all the American decisions which seem to counsel to have important bearing on the ques-

tion here presented. We have in addition, in an appendix to this brief, endeavored to collect all of the decisions in this country in which the plea is in any way referred to, with brief statement of the nature of the case and the decision, and have also quoted applicable statements from the principal text writers. It remains to refer to one Federal statute having bearing on the question.

The Probation Act (Act of March 4, 1925, Ch. 521, 43 Stat. 1259) provides in Sections 1 and 2 as follows:

> SEC. 1. That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

It seems clear that by this Act the Congress evidenced its understanding that the plea of *nolo contendere* can be received in the Federal courts, and that under it a sentence of imprisonment can be imposed. In Section 1 "after conviction or after a plea of guilty or nolo contendere" makes one phrase, as if the three things had the same effect. In the same section the court is authorized, apparently after any of the three, to suspend sentence and place the defendant on probation, "or the court may impose a fine and may also place the defendant upon probation." By Section 2, if the probationer does not behave himself, he may be brought before the court and sentenced, and this power may be exercised not only during the probation period, "but within the maximum period for which the defendant might originally have been sentenced," clearly showing an understanding that he might have been sentenced for some period, and apparently on *nolo contendere* as well as on conviction or a plea of guilty. Congress in this statute has correctly treated this plea as the same as that of guilty, so far as the criminal proceedings are concerned.

CONCLUSION

This is a question of the common law and must be decided on the basis of the common-law authorities. The plea originated in England, but it has been extinct there for many years, and the old authorities in which it is referred to are in some

respects ambiguous and not entirely consistent with each other. Some of them suggest that the plea arose through a desire of the accused to submit to a small fine, but none of them assert that the power of the court upon acceptance of the plea is limited by that desire any more than it would be upon a plea of guilty. The only differences between the pleas which are supported by the English authorities are these: that *nolo contendere* is pleadable only in a case not capital, that it is pleadable only with the court's consent, and that after it the accused is not estopped to make denial when sued later by a private individual. In all other respects the pleas seem to be identical.

In this country the existence of the plea is supported by many decisions in the State and inferior Federal courts. The State decisions are uniform upon the proposition that the plea when accepted in a case in which it can properly be pleaded has the same effect upon the criminal proceedings as the plea of guilty, and sentences of imprisonment upon plea have been affirmed in several States, with no State decision to the contrary. The inferior Federal courts hold it proper to accept the plea, but there is a difference of opinion as to whether a prison sentence may be imposed upon it. The Probation Act, enacted in 1925, is a legislative recognition of the authority of the Federal courts to accept the plea, and the Act assumes that prison sentences may be imposed upon it. Upon reviewing all of the

authorities, English and American, the correct rule seems to be that the principal difference between this plea and that of guilty relates to the question whether the defendant is estopped to make denial when later sued by a private individual. In the criminal proceedings the only differences seem to be that *nolo contendere* is pleadable only with the court's consent and is not pleadable at all in capital cases. When pleaded in a proper case and accepted by the court its effect is just the same as that of the plea of guilty. A prison sentence may therefore be imposed on one plea as well as on the other. Under these rules the sentences to imprisonment in this case were proper.

One thing more may be suggested. Anyone who makes this plea, as the authorities now stand, intends to admit the facts well charged in the indictment. Upon such admission it should require strong reasons to limit the power of the court in passing sentence. Any special limitation not prescribed by statute and based merely on the form in which the defendant couches his admission, is contrary to the usual principles of criminal administration, and should not be incorporated in the law except upon clear grounds.

WILLIAM D. MITCHELL,
Solicitor General.

CHARLES BUNN,
Special Assistant to the Attorney General.

OCTOBER, 1926.

APPENDIX

I

All American decisions referring to *nolo contendere*. (We have referred in the body of the brief to all the English decisions which we have discovered.)

FEDERAL CASES

Shapiro v. *United States,* 235 U. S. 412 (see Brief, p. 3.)

United States v. *Hartwell,* Fed. Case No. 15318 (see Brief, p. 15.)

United States v. *Lair,* 195 Fed. 47 (see Brief, p. 16.)

Tucker v. *United States,* 196 Fed. 260 (see Brief, pp. 3, 12.)

Shapiro v. *United States,* 196 Fed. 268 (see Brief, p. 3).

Hocking Valley Ry. Co. v. *United States,* 210 Fed. 735, holds that upon writ of error after sentence based on this plea the defendant may raise the question whether the acts charged in the indictment constitute a crime.

Stewart v. *United States,* 300 Fed. 769, holds that it is proper, after plea of *nolo contendere* tendered and accepted, but before sentence has been passed, for the court to withdraw its acceptance of the plea and require the defendant to plead over.

Gemignani v. *United States,* 9 F. (2d) 384 (see Brief, p. 15.)

COLORADO

Young v. *People,* 53 Colo. 251, holds that *nolo contendere* is pleadable under the Colorado statute. The court said as to its effect (p. 253):

> Though a plea of guilty, still, we know that in actual practice, in this state, it is generally entered either with the express or tacit understanding of the district attorney, that the court may enter an order dismissing the defendant out of court upon the payment of costs. But it is a plea of guilty upon which sentence may be imposed.

DELAWARE

State v. *Hopkins,* 4 Boyce 306, says (p. 307):

> He pleads *non vult;* that is, he throws himself upon this court to say whether or not he is guilty of an infraction of this law.

ILLINOIS

People v. *Miller,* 264 Ill. 148, holds that under the Illinois code a plea of *nolo contendere* is not permitted.

INDIANA

Mahoney v. *State,* 149 N. E. 444 (1925), holds that under the Indiana code a plea of *nolo contendere* is not permitted.

MAINE

State v. *Lang,* 63 Maine, 215 (at 220), holds it proper, on trial of an indictment for a liquor nuisance, to show a judgment in a prior liquor case, entered on a plea of *nolo contendere.*

State v. *Herlihy,* 102 Maine, 310, holds similar records admissible as affecting credibility of a defendant who takes the stand himself.

State v. *Siddall,* 103 *Maine,* 144 (see Brief, p. 14).

MASSACHUSETTS

Commonwealth v. *Town of Northampton,* 2 Mass. 116, holds that judgment may be arrested after *nolo contendere* when the indictment is defective.

Commonwealth v. *Horton,* 9 Pickering, 206 (see Brief, p. 12).

Commonwealth v. *Tilton,* 8 Metcalf, 232 (see Brief, p. 13).

Commonwealth v. *Grey,* 2 Gray, 501, is the same, on this question, as *Commonwealth* v. *Town of Northampton,* supra.

Statutes of 1855, Ch. 215, Sec. 35: "No admission of the defendant made in court shall be received on the trial without the consent of the prosecutor, except a plea of guilty."

Commonwealth v. *Adams,* 6 Gray, 359, holds that *nolo contendere* can not be received, under this statute, without the consent of the prosecutor; that the consent must appear of record, and if it does not the judgment is erroneous.

Commonwealth v. *Ingersoll,* 145 Mass. 381 (see Brief, p. 14).

Commonwealth v. *Marino,* 150 N. E. 841 (see Brief, p. 14).

MINNESOTA

State v. *Kiewel,* 207 N. W. 646 (1926), holds that under the Minnesota statutes the plea of *nolo contendere* does not exist.

MISSISSIPPI

Williams v. *State,* 130 Miss. 827, holds that ***nolo contendere*** may be pleaded in that State, and the court may impose sentence on the plea.

NEW HAMPSHIRE

State v. *Fagan,* 64 N. H. 431 (see Brief, p. 14).

Philpot v. *State,* 65 N. H. 250 (see Brief, p. 20).

State v. *La Rose,* 71 N. H. 435, holds that in a liquor case a plea of *nolo contendere* to a prior liquor charge is not admissible where not shown to have been followed by conviction.

Collins v. *Benson,* 81 N. H. 10, holds that it is not proper to impeach an expert witness by showing that he once pleaded *nolo contendere* to a charge of larceny.

Lafferty v. *Houlihan,* 81 N. H. 67, holds that in a libel case truth is not proved conclusively by showing that an information was filed against the plaintiff for matters stated in the libel, and that he pleaded *nolo contendere* thereto.

NEW JERSEY

State ex rel. Peacock v. *Judges,* 46 N. J. L. 112 (see Brief, p. 18).

State v. *Henson,* 66 N. J. L. 601, holds that it is proper to inquire of a defendant on cross-examination whether he has pleaded *nolo contendere* to a prior charge of larceny.

State v. *Alderman,* 81 N. J. L. 549, holds that after plea of *nolo contendere* it is not open to defendant to question the sufficiency of the indictment

(under a New Jersey statute providing that such questions must be raised before a plea).

Johnson v. *Johnson,* 78 N. J. Eq. 507, holds that it is proper, in a suit for divorce on the ground of adultery, to show that the defendant husband has pleaded *nolo contendere* to a charge of rape and that that evidence is sufficient proof that he is guilty of adultery.

State v. *Martin,* 92 N. J. L. 436, holds that in a murder case it is not error for the court to refuse to accept the plea *non vult contendere* tendered by defendant.

NORTH CAROLINA

State v. *Burnett,* 174 No. Car. 796 (see Brief, p. 20).

PENNSYLVANIA

Buck v. *Commonwealth,* 107 Pa. 486, holds that on the trial of an accessory a plea of *nolo contendere* by the principal, upon which no judgment has been entered, is not admissible in evidence, since it is not a conviction until judgment entered, but is merely a confession by the principal, which is not admissible against accessories. The court characterized the plea as "a mild form of pleading guilty."

Commonwealth v. *Holstine,* 132 Pa. 357 (see Brief, p. 16).

Commonwealth v. *Ferguson,* 44 Pa. Super. Ct. 626 (see Brief, p. 17).

Commonwealth v. *Jackson,* 248 Pa. 530, holds that where school officers were indicted for accept-

ing bribes, and pleaded *nolo contendere,* with a protestation of innocence, the resulting judgment was nevertheless a "conviction" which forfeited their offices.

Commonwealth v. *Shrope,* 264 Pa. 246 (see Brief, p. 17).

RHODE ISLAND

State v. *O'Brien,* 18 R. I. 105 (see Brief, p. 14).

State v. *Conway,* 20 R. I. 270. In this case the prosecution was permitted at the trial to show that the defendant had pleaded *nolo contendere* on a previous occasion. The statute was that "conviction or sentence for any crime or misdemeanor may be shown to affect his credibility." It appeared that in the prior case defendant had not been sentenced on her plea, but that *nolle prosequi* had been entered on her paying $100.00 to the State by way of compromise. The court held that this was neither a conviction nor a sentence, and that it was error to admit the evidence.

Barker v. *Almy,* 20 R. I. 367, holds that one who pleads *nolo contendere* to an indictment for embezzlement and is sentenced to a fine has been "convicted" of that crime within the meaning of a statute giving the injured party double damages.

Doughty v. *De Amoreel,* 22 R. I. 158, holds that one who pleads *nolo contendere* to an indictment for embezzlement and is not sentenced but is placed under the control of a probation officer is not "convicted" within the meaning of the same statutes.

Ex parte Lanni, 131 Atl. 52; 131 Atl. 927 (see Brief, p. 20).

WISCONSIN

Birchard v. *Booth*, 4 Wis. 67, was a civil action for assault and battery. Evidence was introduced that defendant admitted the battery before a police magistrate. It was claimed that the admission amounted to a plea of *nolo contendere* and was therefore not admissible in evidence in a civil case. The court defined the plea, held that the admission here was different, and that the evidence was proper.

II

TEXTBOOK STATEMENTS

The statements of the older English textbooks are quoted in the brief. The more recent English books contain no reference whatever to the existence of the plea. The following have been examined:

Russell on Crimes, 8th Edition.

Archbold's Criminal Pleading, Evidence & Practice, 26th Edition.

Bowen-Rowlands on Criminal Proceedings.

Halsbury—The Laws of England.

The American textbooks commonly have something on the plea. The statements of the chief books are as follows:

Wharton, Criminal Procedure, Tenth Ed., Sec. 1346:

> The plea of *nolo contendere* has the same effect as a plea of guilty, so far as regards

the proceedings on the indictment; and a defendant who is sentenced upon such a plea to pay a fine is convicted of the offense for which he is indicted.

The advantage, however, which may attend this plea is, that when accompanied by a protestation of the defendant's innocence, it will not conclude him in a civil action from contesting the facts charged in the indictment.

It is held within the discretion of the court to accept such a plea, or to require a plea of guilty or not guilty.

Bishop, New Criminal Procedure, 4th Ed., Sec. 802:

1. This plea (*nolo contendere*) is the defendant's declaration in court that he will not contend with the prosecuting power.

2. It is pleadable only by leave of court, and in light misdemeanors. The difference between it and guilty appears simply to be, that while the latter is a confession binding the defendant in other proceedings, the former has no effect beyond the particular case. It simply justifies the court in imposing its sentence.

Zoline, Federal Criminal Law and Procedure, Sec. 222:

The plea of *nolo contendere* is a declaration on the part of the defendant that he will not contend with the prosecution. Under the common law rule, which governs in our Federal Courts, the plea of *nolo contendere* was in the nature of a motion to submit to a small fine and was taken only in cases of slight misdemeanors. Hence, imprisonment cannot be imposed upon a plea of *nolo contendere.* (Citing *Tucker* v. *United States.*) The plea

is in the nature of a compromise between the government and the defendant. It is not a plea as of right and can only be entered with the consent of the United States Attorney and the court. When accepted by the prosecuting attorney and court, it becomes an implied confession of guilt; and for the purposes of the case only is equivalent to a plea of guilty; but distinguishable from such plea in that it can not be used against the defendant as an admission in any civil suit for the same act. There is no difference in legal effect between the plea of *nolo contendere* and the plea of guilty with regard to all proceedings in the indictment. Although the plea of *nolo contendere* is considered as an implied confession of guilt, it must be kept in mind that cases often arise where an accused person might find himself without witnesses to establish his innocence because of their death, absence or other causes.

○

SUPREME COURT OF THE UNITED STATES.

No. 307.—October Term, 1926.

C. A. Hudson and R. R. Brogan, Petitioners, *vs.* United States. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 22, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioners were indicted in the District Court for western Pennsylvania for conspiracy to use and for using the mails to defraud, crimes punishable by fine or imprisonment or both (§§ 37, 215 Criminal Code). On pleas of *nolo contendere* they were sentenced to imprisonment for one year and one day. The conviction and sentence were affirmed by the Court of Appeals for the Third Circuit. 9 Fed. (2d) 825. The case is here on certiorari. 271 U. S. 652, Jud. Code, § 240(a), as amended.

The sole question raised by the assignment of error is whether a United States court, after accepting a plea of *nolo contendere*, may impose a prison sentence. It is the contention of petitioners that the plea in effect is conditioned upon the imposition of a lighter penalty; that therefore the court may not accept the plea to an indictment charging a crime punishable by imprisonment only, and if accepted where the crime is punishable by imprisonment or fine or both, it may not accept the plea and ignore the condition by imposing a prison sentence. This contention is supported by *Tucker* v. *United States* (C. C. A. 7th), 196 Fed. 260; *Shapiro* v. *United States* (C. C. A. 7th), 196 Fed. 268; *Blum* v. *United States* (C. C. A. 7th), 196 Fed. 269; in which sentences of imprisonment on the plea of *nolo contendere* were set aside. But in *United States* v. *Lair* (C. C. A. 8th), 195 Fed. 47, *habeas corpus* was denied a prisoner confined for a two-year term upon this plea, but the objection pressed here apparently was neither

raised nor considered. The state courts have rejected the contention when made.[1]

The use of the plea in the federal courts and the propriety of imposing a prison sentence upon it are recognized by the Probation Act; March 4, 1925, c. 521, 43 Stat. 1259. Section 1 of that Act provides for the suspension of sentence and the release of the prisoner on probation "after conviction, or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment."

The plea of *nolo contendere* was known to the common law, and is referred to, although not by name, by a modern English text writer. See Archbold's Pleading, Evidence and Practice in Criminal Cases (26th ed. 1922) 379. But no example of its use in the English courts has been found since the case of *Queen* v. *Templeman,* decided in 1702, 1 Salk. 55, where although a fine was imposed, the question now under consideration was neither decided nor discussed.

The view of the court in the *Tucker case* that a prison sentence may not be imposed on the plea of *nolo contendere* rests upon no more substantial basis than a possibly ambiguous phrase in a passage from Hawkins, Pleas of the Crown, 8th ed., Book 2, ch. 31, 466. The author prefaces the chapter, "Of Confessions and Demurrer", with the remark "And now I am to consider what is to be done to a prisoner upon his confession; which may be either Express or Implied". In §§ 1 and 2, he points out that a confession of guilt "carries with it so strong a presumption of guilt,

[1]The precise question has rarely been raised. The contention now considered was explicitly rejected in *Commonwealth* v. *Ferguson,* 44 Pa. Sup. Ct. 626. In most cases, however, the courts have ordered imprisonment on pleas of *nolo contendere* without discussing the matter. *Commonwealth* v. *Holstine,* 132 Pa. 357; *State ex rel. Peacock* v. *Judges,* 46 N. J. L. 112; *Philpot* v. *State,* 65 N. H. 250; *In re Lanni* (R. I.) 131 Atl. 52, 927. *State* v. *Burnett,* 174 N. C. 796, may be cited as more than inferentially recognizing the power to impose a prison sentence since the court expressly considered its authority to order imprisonment, after having granted a suspended sentence upon this plea. The plea has of course been received in prosecutions for offenses punishable by fine only, without any intimations being made that its use is restricted to such cases, *Young* v. *People,* 53 Colo. 251; *State* v. *Hopkins,* 4 Boyce, 306; and accepted on charges punishable by both fine and imprisonment and a fine only imposed. *Williams* v. *State,* 130 Miss. 827. In Illinois, Indiana and Minnesota, the plea is not allowed. See *People* v. *Miller,* 264 Ill. 148, 154; *Mahoney* v. *State* (Ind.), 149 N. E. 444, 447; *State* v. *Kiewel* (Minn.) 207 N. W. 646, 647.

that an entry on record, *quod cognovit indictamentum*, etc., in an indictment of trespass, estops the defendant to plead 'not guilty' to an action brought afterwards against him for the same matter." He then says:

"Sec. 3. An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam regis*, without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum*."

This passage appears in all the earlier editions of Hawkins. It has been handed down from generation to generation of text writers in substantially the same form with occasional glosses, but researches rarely went further.[2] Similarly judicial study of the history of the plea halts with Hawkins.

The author, neither here nor elsewhere, fulfills his promise "to consider what is to be done to a prisoner upon his confession."

[2]Comyns in his "Digest", under Indictment, ch. K, at p. 513 of the 1765 ed., "Confessions", draws the same distinction between the two types of confessions and cites as his sole authority, 9 H. VI, 60. Viner similarly considers the different effects of the pleas as estoppels. (Abridgment, 2nd ed. 1792, Vol. 10, Estoppel, pp. 435-6.) Burn practically quotes Hawkins who is his only authority (Justice of the Peace, 5th ed. 1758, Confession, 149-150). This passage is still printed in the thirtieth edition of 1869, edited by J. B. Maule. Chitty, relying upon Hawkins, Comyns, Burn and the case of *Queen* v. *Templeman*, *supra*, makes no further contribution (The Criminal Law, 1819, Vol. I, p. 431). In Jervis' twelfth edition of Archbold (1853) the effect of the plea upon an indictment for misdemeanor is described, the passage intimating that its only use is in such crimes. No authority for the restriction is offered other than Hawkins, who merely limited the use to "a case not capital." This passage is repeated in all the later editions and is the same as that in the 26th edition already cited. Gabbett, Criminal Law (1843) 320; 1 Colby, Criminal Law (1868) 287; Clark, Criminal Procedure (1895) 374, to cite a few of the standard treatises of that century with no pretension of completeness, rely upon Hawkins essentially for their historical data. As for the more modern texts, 2 Wharton Criminal Procedure (10th ed. 1918), § 1346, adds nothing, and 2 Bishop, New Criminal Procedure (2nd ed. 1913), § 802, limits the availability of the plea to light misdemeanors. The encyclopedias and dictionaries go back to Hawkins and indicate the variations of state court decisions.

It is to be noted that this and the preceding sections are directed only to the effect of the confession, whether express or implied, as an estoppel. He does not undertake to state with any certainty the precise effect of the implied confession upon the sentence. Putting oneself on the mercy of the king seems to have been at least an appeal for mercy, and at most a consent to be fined if let off with that —not a plea, but a petition, the rejection of which may possibly have required a plea. The text states the rule of law that has never been questioned that the implied confession as contrasted to the express confession does not estop the defendant to plead and prove his innocence in a civil action.

But even if we regard the implied confession as a petition which in Hawkins' time had to be accepted as tendered, in modern practice it has been transformed into the formal plea of *nolo contendere*. Like the implied confession this plea does not create an estoppel, but like the plea of guilty, it is an admission of guilt for the purposes of the case. Section 3, it is true, speaks of the defendant's yielding to mercy and his desire "to submit to a small fine" but even if we assign to these words the more comprehensive meaning suggested, they do not say that the court is bound to yield to the prisoner's petition in fixing sentence, nor do they suggest that the court by accepting a formal plea which admits guilt for the purposes of the case would be bound to yield to its implied appeal for mercy.

The genesis of the phrase "desiring to submit to a small fine" used by Hawkins indicates unmistakably that its purpose was illustrative only. The authorities cited by Hawkins are Lambard's Eirenarcha, Book 4, ch. 9; 9 H. VI, 60; 11 H. IV 65; 1 Fitzherbert, Gr. Abr., Estoppel, par. 24. The pertinent passage in Lambard is:

". . . as where he putteth himselfe in *Gratiam Reginae, & petit admitti per finem*, without any more, or (by Protestation that he is not guilty) pleadeth his pardon; and such a Confession (if I may so call it) doth not so conclude him, but that he may afterward plead Not guiltie in any Action brought against him . . ." (p. 506.)

The authorities cited, as in Hawkins, are 9 H. VI, 60 and 11 H. IV, 65. In the same chapter, Lambard, in a passage for which no counterpart is found in Hawkins, unless it be the phrase already considered, queries whether the justices may reject the plea and

in consequence "drive the party either to an absolute confession (for increase of the Fine) or to his Traverse, that (failing therein) he may be imprisoned and fined also." But this query leaves it uncertain whether the reduction of sentence following the implied confession is a matter of right upon which the prisoner may insist, or discretionary with the court.

Of the reports from the year books cited both by Hawkins and Lambard, 11 H. IV deals with express confessions. The extract from 9 H. VI is a colloquy between counsel and the court. The translation is printed in the margin.[3] Its effect is that if one, indicted for trespass, has "put himself on the grace of our Lord the King and asked that he might be allowed to pay a fine (*petit se admitti per finem*)", his plea, if accepted, does not estop him from afterwards pleading not guilty. We have here the same illustration used by Hawkins and Lambard properly applied, as the case was one of trespass, but there is no suggestion that would warrant the conclusion that a court, by the mere acceptance of the plea of *nolo contendere*, would be limited to a fine in fixing sentence. Fitzherbert merely digests this year book case. A citation to Farresly, 40, added in the later editions of Hawkins, is the case of *Queen* v. *Templeman* in Salkeld to which reference has already been made.

We think it clear, therefore, that the contention now pressed upon us not only fails of support in judicial decisions other than those of the seventh circuit already noticed, but its historical background is too meager and inconclusive to be persuasive in leading us to adopt the limitation as one recognized by the common law.

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[3] "WESTON. If one be indicted for Trespass, and he surrenders and pays a fine, will he be permitted afterwards to plead Not Guilty?

"PASTON. (J.) Yes; certainly.

"Which was agreed by all the Court.

"WESTON. It is of record that he admitted it.

"BABBINGTON. If the entry be so, he will be estopped; but the entry is not so, but is thus, that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine (*petit se admitti per finem*).* Therefore, if one be indicted for felony, and has a charter of pardon, and pleads it, and prays that it be allowed, this does not prove that he is guilty; but the King has excluded himself (from claiming guilty) by his charter. And I and all the Court are against you on this point."

*The folio reads admittit, obviously a mistake.

Undoubtedly a court may, in its discretion, mitigate the punishment on a plea of *nolo contendere* and feel constrained to do so whenever the plea is accepted with the understanding that only a fine is to be imposed. But such a restriction made mandatory upon the court by positive rule of law would only hamper its discretion and curtail the utility of the plea.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court. U. S.